Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

SOCIETE NATIONALE DES CHEMINS DE FER FRANCAIS,

Petitioner,

v.

RAYMOND ABRAMS, NICOLE BE SILBERKLEIT, JANET HERMAN, LILY REDNER BERNARD CARON, ERNEST HAAR, HARRY CYBULSKI, YVONNE LITMAN, CASSANDRA KIRBY CONAHAY FREUND, JEAN-JACQUES FRAENKEL, LILIANE LICHTENSTEIN and MARIE WEINRAUCH,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether conferral of immunity by the Foreign Sovereign Immunities Act of 1976 on a foreign state instrumentality is to be disrgarded on the ground that the claim arose prior to passage of the Act.

2. Whether a court may inquire in a current litigation how the Department of State would have responded in a particular case to a request for sovereign immunity in an action brought prior to 1952.

STATEMENT PURSUANT TO RULE 29.6

Petitioner Société Nationale des Chemins de Fer Français (SNCF) is a corporation formed under the Laws of France, with the task of operating the French railway and associated facilities. All of the stock of SNCF is owned by the French Republic.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The district court's opinion (per Trager, D.J.) dismissing the complaint (Pet. App. B) is published at 175 F. Supp. 2d 423 (2001). The Court of Appeals' opinion (per Cardamone, J., joined by Miner and Sotomayor JJ.) vacating and remanding the judgment of the district court (Pet. App. A) is published at 332 F.3d 173 (2003).

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Foreign Sovereign Immunities Act of 1976 as amended, 28 U.S.C. §§ 1330, 1441(d), 1602-1611. (Pet. App. C.)

STATEMENT OF THE CASE

Introduction

This case is one more in a recent flurry of actions seeking damages in United States courts from foreign sovereigns on the basis of events occurring during World War II.[1] In contrast to all the other recent cases in this series, in which plaintiffs have sought to take advantage of the easing of the rules of sovereign immunity by adoption of the Foreign Sovereign Immunities Act of 1976, the present case is based on the assertion (strongly controverted by defendant) that the FSIA

1. For a list and discussion of many of these cases, *see* Burt Neuborne, "Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts," 80 Wash. U.L.Q. 795, especially at note 2 (2002).

took away a right to sue in U.S. courts that was available at the time of the events giving rise to the claim. Thus while in the other cases *defendants* have urged that the FSIA be construed not to apply to claims that arose in the Age of Absolute Immunity, in this case it is *plaintiffs* who urge that the Act be construed not to apply to events at the time of World War II, while denying that that period was the Age of Absolute Immunity.

The opinion is this case is in conflict with decisions of other courts of appeals in several aspects, as spelled out hereafter.

The Foreign Sovereign Immunities Act of 1976

Section 1604 of the Act provides that foreign sovereigns and their instrumentalities are immune from the jurisdiction of U.S. courts unless one of the exceptions set out in §§ 1605-1607 is applicable, and § 1603 provides that foreign state instrumentalities meeting specified criteria are included in the definition of a state. If one of the exceptions to immunity is applicable, § 1330 confers jurisdiction on U.S. district courts of any nonjury civil action against a foreign state as defined. Section 1602 provides that claims of foreign states to immunity "should henceforth be decided by courts of the United States and of the States in conformity with [the Act]."

The Claim

The gravamen of the complaint, filed in September 2000, is that defendant SNCF, the French National Railway, violated international law by contributing in the period 1942-44 to the deportation of Jews and other members of the civilian population of France to extermination and slave labor camps maintained by Nazi Germany.

The Motion to Dismiss

The Defendant contends that U.S. courts have no basis for jurisdiction of this case, either over the subject matter or over the defendant, because it is a foreign state instrumentality as defined, and the only basis for jurisdiction over a foreign sovereign or a foreign state instrumentality is what is set out in the Foreign Sovereign Immunities Act, *see Argentine Republic v. Amerada Hess*, 488 U.S. 428 (1989). None of the exceptions to immunity set out in the FSIA is applicable to the present action, and accordingly it is immune from jurisdiction of the district court.

Plaintiffs' Response

Plaintiffs concede that the Foreign Sovereign Immunities Act does not afford a basis of jurisdiction over SNCF. This is so because § 1603(b) makes clear that for most purposes a state-owned instrumentality is treated in the same way as the sovereign state itself. Plaintiffs contend, however, that the Act does not apply, or should not be applied, to claims that arose prior to the passage of the Act. They seek instead to found their action on federal question jurisdiction under 28 U.S.C. § 1331, on the basis of alleged violations by defendants of the law of nations and specified instruments of international law, as well as on the Alien Tort Statute of 1789, as revived and reinterpreted in the past two decades. Moreover, plaintiffs contend that prior to passage of the Foreign Sovereign Immunities Act, U.S. courts would not have granted immunity to the French state-owned railway even on claims unrelated to the United States — a contention strongly controverted by petitioner in the courts below, but neither accepted nor rejected by the court of appeals.[2]

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2. The district court, having held that it was not necessary to decide the point (Pet. App. p. 67a), nevertheless concluded "... it is worth noting that plaintiffs' claims that pre-1952 sovereign immunity law would have worked to permit jurisdiction in this case appears unsupported. Pet. App. at 67a, discussed further at pp. 25-26.

The Court of Appeals Decision

The court of appeals seems to have understood U.S. law in what it regarded as the relevant period – pre-1952 – as upholding the absolute theory of immunity. But it wrote that "both sides overlook one crucial aspect of the pre-FSIA law and practice in the United States – the State Department's role in courts' foreign sovereign immunity determinations." (Pet. App. 25a, 332 F.3d at 187). The court observed that the State Department often intervened in litigation by filing a suggestion of immunity, but not always. If it could be shown that neither the Department nor the courts would have determined that SNCF was entitled to immunity at the relevant time, then, said the court of appeals, application of the FSIA to dismiss plaintiffs causes of action would be "impermissibly retroactive." The court of appeals framed the question as whether plaintiffs legitimately could have expected to litigate their claims in the United States. (Pet. App. 24a, 332 F.3d at 186).[3]

The Question of Retroactivity

The court of appeals was required to confront *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), in which this Court (reversing the Second Circuit) held that the Foreign Sovereign Immunities Act "provides the sole basis for obtaining jurisdiction over a foreign state in our courts," *id.* at 434, and rejected suggestions that the Alien Tort Statute or other plausible bases for federal jurisdiction pre-FSIA had somehow survived passage of the Act. Without expressly distinguishing the present case from *Amerada Hess*, however, the court of appeals considered itself not bound by that decision, apparently on the basis that the events giving rise to the claim in *Amerada Hess* occurred after the passage of the Act, whereas the acts here alleged to support the complaint

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3. Note that this is the reverse of the issue as framed in *Altmann v. Republic of Austria*, 317 F. 3d 954 (9th Cir. 2002), which asked whether the *defendant sovereign* could have legitimately expected to be immune from jurisdiction in the United States. *Id.* at 965. The *Altmann* case is discussed at pp. 14 and 16-17, *infra*.

occurred more than a quarter century prior to passage of the Act. The court of appeals made no affirmative statement anywhere in its opinion about what provision of law would support jurisdiction of the district court if the FSIA were held not to be applicable.

The court of appeals also addressed the decision in *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1121 (1995), in which the D.C. Circuit had held that either the FSIA applied to bar a holocaust-related claim, or that the claim was barred by the pre-1952 doctrine of absolute immunity. The court of appeals conceded that under the analysis in *Princz* there would be no jurisdiction over the claim in the present case and no reason to conduct the inquiry for which it remanded the action. But it disagreed with the D.C. Circuit's understanding of this Court's decision in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), and wrote "We are unable to agree with the *Princz* court's view. . . ." (Pet. App. 18a, 332 F.3d at 183).

As the court of appeals construed *Landgraf* and its progeny, it indicated that two questions needed to be answered in this case:

> (1) has Congress clearly expressed its intent that [the jurisdiction-creating and jurisdiction-ousting provisions of the FSIA] be applied to lawsuits based on pre-1976 events? and if not,
>
> (2) would the application of these provisions to the plaintiff's claims have a retroactive effect?

Pet. App. at 18a, 332 F.3d at 183. The court of appeals answered the first question in the negative, holding that "the rigorous requirement of an unambiguous Congressional direction is not satisfied." Pet. App. 19a, 332 F.3d at 184. As to the second question, the court of appeals was not prepared either to accept or to reject plaintiffs' contention that their claims could have

been adjudicated in the United States. Accordingly, the court remanded the case to the district court to develop a record that would enable the court to answer the question.

This petition for a writ of certiorari followed.[4]

REASONS FOR GRANTING THE PETITION

Four interrelated reasons call for review by this Court:

First, the decision of the court of appeals goes against two of this Court's rulings construing the FSIA — the 1989 decision in *Amerada Hess* and last term's decision in *Dole Food Co. v. Patrickson.*

Second, the decision of the Court of Appeals for the Second Circuit stands in conflict with the decisions of other circuits over application of the FSIA to events prior to its passage, and over interpretation of the rules and presumptions concerning the retroactive effect of federal jurisdiction statutes.

Third, the court of appeals misinterpreted this Court's decision in *Landgraf* and other rulings on retroactivity as applied to the FSIA.

Fourth, the decision calls for an unprecedented and uncharted search for the past — not for what did happen, the usual task of courts, but for what would have or might have happened if . . . in this case if plaintiffs had filed this action in the 1940s. In ordering this search, the decision would require the State Department to become involved in individual actions against foreign states, contrary to the express intent of Congress when it enacted the FSIA.

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4. A petition for certiorari has also been filed in *Republic of Austria v. Altmann,* recently decided by the Court of Appeals for the Ninth Circuit. While the positions of the petitioners in that case and in the present case are not the same on all issues, the two cases present the same underlying questions and the Court may wish to consider the cases together.

I. The Court of Appeals Repeated the Error that Led to Review and Reversal in Amerada Hess.

A. *Amerada Hess, as modified by the Court of Appeals.*

As noted above, Congress made clear in the Findings and Declaration of Purpose section of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602, that "claims of foreign state immunity shall henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this Chapter." To that end, Congress enacted 28 U.S.C. § 1330, conferring jurisdiction on the district courts "of any nonjury civil action against a foreign state as defined . . ." (including state instrumentalities), and modified the diversity and alienage section of the Judiciary Act to provide for jurisdiction involving a foreign state as defined only when that state is plaintiff. *See* 28 U.S.C. § 1332(a)(4).

Nevertheless, when Amerada Hess Shipping Corporation, a corporation organized under the laws of Liberia, sought to sue the Argentine Republic in federal court in New York on a cause of action having no connection with the United States and hence no basis for jurisdiction under the FSIA, the court of appeals, reversing the district court, found a way around the exclusivity provisions of the Act, *Amerada Hess Shipping Corporation v. Argentine Republic*, 830 F.2d 421 (2d Cir. 1987). The court of appeals held (i) that the cause of action, based on bombing of a merchant vessel on the high seas, stated a violation of international law; (ii) that therefore the claim stated a cause of action under the Alien Tort Statute of 1789, codified at 28 U.S.C. § 1350; and (iii) that the Alien Tort Statute had not been repealed or overtaken by the FSIA. Conceding that the House Report on the FSIA, as well as the decision of this Court in *Verlinden B.V. v. Central Bank of Nigeria*, 460 U.S. 480 at 496-97 (1983), had stated that the FSIA sets forth the sole and exclusive standard to be used in resolving questions of sovereign immunity, the court of appeals wrote that in enacting the FSIA Congress was not focusing on violations of international law, and that "close examination of the legislative

history of the FSIA demonstrates that Congress did not intend to remove existing remedies in United States courts for violations of international law of the kind presented here," 830 F.2d at 426. Further, the court found that contemporary international law denies immunity for violations of international law.[5] Accordingly, the court of appeals wrote:

> Since Congress did not express a clear intent to contradict the immunity rules of international law, and indeed, left the Alien Tort Statute in force, we conclude, that the FSIA does not preempt the jurisdictional grant of the Alien Tort Statute.

830 F. 2d at 427.

This Court granted review and unanimously reversed. *Argentine Republic v. Amerada Hess Shipping Corporation*, 488 U.S. 428 (1989). The Court's opinion, per Rehnquist, C.J., stated:

> In light of the comprehensiveness of the statutory scheme in the FSIA, we doubt that even the most

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5. It may be noted that this finding is far from self-evident. In a recent decision concerning an allegation that the United Kingdom had denied the victim of torture in Kuwait access to its courts in violation of the European Convention on Human Rights by upholding a claim of immunity by Kuwait, the European Court of Human Rights rejected the proposition asserted by the court of appeals. *Al-Adsani v. United Kingdom (Scope of State Immunity)*, (2002) 34 E.H.R.R. No. 11 (21 Nov. 2001). In upholding the decision of the English court, the Court of Human Rights wrote:

> The Court, while noting the growing recognition of the overriding importance of the prohibition of torture, does not . . . find it established that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil damages for alleged torture committed outside the forum state.

34 E.H.R.R. at 293. *See also* Hazel Fox, *The Law of State Immunity* pp. 5-6 (2002).

> meticulous draftsman would have concluded that Congress also needed to amend *pro tanto* the Alien Tort Statute and presumably such other grants of subject matter jurisdiction in Title 28 as § 1331 (federal question), § 1333 (admiralty), § 1335 (interpleader), § 1337 (commerce and antitrust), and § 1338 (patents, copyright and trademark). Congress provided in the FSIA that "[c]laims of foreign states to immunity should *henceforth* be decided by courts of the United States in conformity with the principles set forth in this chapter," and very likely it thought that should be sufficient.

488 U.S. at 437-38.

The same story seems to be repeating itself in the present case. Again, the district court dismissed, and again the court of appeals reversed. As in its decision in *Amerada Hess*, the court of appeals cited the "henceforth" passage from § 1602 of the FSIA and the excerpt from the House Report, and again the court concluded that there could be no jurisdiction under the Act. However, the court of appeals determined that the FSIA was not applicable to the events on which the claims were based. The court of appeals cited this Court's holding in *Amerada Hess*, but with a not so subtle twist:

> The Supreme Court's holding in *Amerada Hess* instructs that, *if the FSIA applies*, neither of the mentioned statutes [28 U.S.C. § 1331 and the Alien Tort Statute] can serve as a jurisdictional predicate for this action, and district courts may entertain the case based solely on the jurisdictional provision of the FSIA. (italics supplied).

Pet. App. at 10a, 332 F.3d at 179.

In fact, the Chief Justice's opinion in *Amerada Hess* did not contain the italicized words, or any comparable expression. It was only by distortion of the Court's holding in *Amerada*

Hess that the court of appeals opened the door to its discussion of "retroactivity," leading in turn to rejection of the proposition that the FSIA reflects Congress' intent that all actions against foreign states as defined are subject to the Act's provisions.

It is respectfully submitted that such distortion of the clear holding of this Court should not stand unreviewed.

B. *The Impact of Dole Food Co.*

Six weeks before the court of appeals issued its decision in the present case, this Court decided *Dole Food Co. v. Patrickson*, 538 U.S. __, 123 S. Ct. 1655 (2003), holding that the relevant date for determining whether a defendant is immune under the FSIA is the date the action is filed, not the date the cause of action arose. Justice Kennedy's opinion for the Court recites the "longstanding principle that 'the jurisdiction of the Court depends upon the state of things at the time the action is brought'", *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993), quoting Chief Justice Marshall in *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824).

Moreover, the Court's opinion in *Dole* stresses the use of the present tense in the Act – "a majority of whose shares . . . *is* owned by a foreign state," § 1603(b)(2), quoted at slip opinion p. 9, 123 S. Ct. at 1662. The same point applies with respect to the jurisdiction section of the Act, § 1330(a): "The district courts shall have original jurisdiction . . . as to any claim for relief . . . with respect to which the foreign state *is* not entitled to immunity. . . ." (italics supplied).

The court of appeals acknowledged the decision in the *Dole* case, but made no effort to draw the necessary inference. If this Court had come out the other way on this issue in *Dole*, i.e., if this Court had said that the status of a defendant for purposes of the FSIA had to be determined as of the date the cause of action arose, one might have argued that the application of the FSIA to a given case should likewise depend on the time that the cause of action arose. But this Court held

precisely the opposite. That the opinion of the court of appeals failed to draw the logical inference from what this Court held in *Dole*, i.e., that the operative date for the jurisdictional provisions is the same as the operative date for the definition section of the Act, is unexplained and unexplainable, and should not stand uncorrected.

II. The Decision in *Abrams* Stands in Conflict With Decisions in Other Circuits Over the Application of the Foreign Sovereign Immunities Act to Events Prior to Its Effective Date.

Four circuit courts of appeals have recently decided five cases brought against foreign sovereigns based on events during World War II. Two of the suits were brought against Germany, one against Austria, one against France, and one against Japan. Each of the cases raised the question whether the Foreign Sovereign Immunities Act of 1976 is applicable to events prior to 1952, when the State Department announced (and the courts generally accepted) the so-called Restrictive Theory of Immunity. The cases in the D.C., Seventh, and Ninth Circuits present the question in the context of whether an exception to immunity provided for in the Foreign Sovereign Immunities would work an impermissibly retroactive effect on the interests of the foreign state. The instant case presents the question in the context of whether *plaintiffs* can object to the application of the Foreign Sovereign Immunities Act on grounds of an impermissibly retroactive effect when the FSIA provides no basis for an exception to immunity with respect to claims that they contend might have brought under pre-1952 law or practice. The circuit decisions create a direct conflict on two aspects of this issue: 1) applicability of the FSIA to the events of World War II, and 2) the type of inquiry that is necessary to resolve the question. Regardless of context, from the point of view of foreign states and their relations with the United States and its judicial system, the uncertainty generated by the conflicting rulings is intolerable. This case — along with the recent Ninth Circuit decision in *Altmann v. Republic of Austria*, 317 F.3d 954 (9th Cir. 2002), amended 327 F.3d 1246

(2003), cert. pending – presents this Court with the opportunity to resolve the various conflicts, and to clarify application of the Foreign Sovereign Immunities Act to World War II claims.

A. Applying the FSIA to Pre-Enactment Events.

The decision of the Second Circuit in the present case stands in conflict with rulings in other federal courts of appeals that have faced the question. Judge Cardamone's opinion acknowledges the inconsistency with the decision of the Court of Appeals for the District Court of Columbia in *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994), explicitly stating that "we decline the [defendant's] invitation to adopt the reasoning of *Princz*". (Pet. App. 18a, 332 F.3d at 183-84).

In *Princz*, an American citizen who survived the Holocaust sued the Federal Republic of Germany for injuries suffered as a prisoner in Nazi concentration camps during World War II. The German government argued (1) that the plaintiff's claim did not come within any of the exceptions to the Foreign Sovereign Immunities Act; and (2) that even if a basis for sustaining the claim could be found under the FSIA, the Act should not be applied retroactively to claims based on pre-1952 events, when Germany would have been entitled to absolute immunity. Both the district court and the Court of Appeals held that the claim in *Princz* did not come within any of the exceptions to the FSIA.

The Court of Appeals also addressed the question whether the FSIA applied to events prior to 1952. In deciding that there is a "strong argument" in favor of applying the FSIA retroactively, Judge Douglas Ginsburg, writing for the majority, relied on the express language of § 1602 that "Claims of foreign states to immunity should henceforth be decided . . . in conformity with the principles [of the Act]." The court explained that its understanding that the Foreign Sovereign Immunities Act must apply to acts of a foreign government taken prior to 1976 was reinforced by the fact that in adopting

the FSIA Congress had removed provisions for diversity jurisdiction over suits by a United States citizen against a foreign state. Thus, the court observed, unless Congress intended to deny a federal forum for all suits against a foreign sovereign that were filed after enactment of the FSIA but based upon pre-FSIA facts, "the implication is strong that all questions of foreign sovereign immunity, *including those that involve an act of a foreign government taken before 1976,* are to be decided under the FSIA." 26 F.3d at 1170 (italics added).

The confusion about the retroactivity issue as applied to the FSIA is evident in the D.C. circuit itself, in its most recent decision, also written by Judge Douglas Ginsburg. *See Joo v. Japan*, 332 F.3d 679 (D.C. Cir. June 23, 2003). In referring to its earlier decision in *Princz*, the court of appeals in *Joo* took a different approach from *Princz* both in terms of the understanding of the "henceforth" language of the FSIA and in terms of the impact of subsequent Supreme Court decisions on retroactivity. The *Joo* case involved claims by "comfort women" from China, Taiwan, and South Korea against Japan for alleged violations of "both positive and customary international law". In addition to ruling that the claims were barred by the 1951 Treaty of Peace between Japan and the Allied Powers, TIAS 2490, 3 U.S.T. 3169 (Sept. 8, 1951) and related international agreements between Japan and China and Korea, the court stated that application of the commercial activity exception to events that occurred prior to 1952 would interfere with the "settled expectation, left undisturbed by the Congress, that Japan would not face suit in the courts of the United States for its actions during World War II." 332 F.3d at 687. In other words, applying the FSIA to *deny* immunity in respect of claims based on wartime events would have an impermissibly retroactive effect.[6] Both *Princz* and *Joo* uphold immunity, but the issue of retroactivity remains in doubt.

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6. It is notable that the D.C. Circuit took this position without first considering whether the acts alleged in the case constituted a commercial activity for purposes of invoking an exception to immunity.

The conflict among the circuits over the issue of retroactivity continues, with the decision of the Ninth Circuit in *Altmann v. Austria*, 317 F.3d 954 (9th Cir. 2002), amended 327 F.3d 1246 (2003), cert. pending. *Altmann* is in direct conflict with the decision of the Second Circuit in *Abrams* and, to some extent with *Joo*. Plaintiff claimed restitution or compensation for paintings wrongfully expropriated by the Austrian government during the Nazi era. Plaintiff based her suit on § 1605(a)(3) of the FSIA, a provision creating an exception to immunity for claims based on expropriation in violation of international law. The court acknowledged that no such exception to immunity existed in pre-1976 law or practice, and that application of the FSIA to such an action would undermine the legitimate expectations of the foreign sovereign if its government could have expected immunity at the time of its challenged conduct. The court held, however, that Austria could not have expected immunity for its behavior when it refused to grant restitution after the War for seizures perpetrated when Austria was under German control. Thus, application of the FSIA to support plaintiff's claims would not be "impermissibly retroactive."

In *Sampson v. Federal Republic of Germany*, 250 F.3d 1145 (7th Cir. 2001), plaintiff, a holocaust survivor, alleged that violations of international law by Germany operated as a waiver of sovereign immunity under the Foreign Sovereign Immunities Act. Germany argued that to apply the FSIA to pre-1952 events would have an impermissibly retroactive effect, in that it would alter the absolute immunity rule in existence at the time of the challenged conduct. The court of appeals for the Seventh Circuit held that it need not determine whether the pre-1952 law of absolute immunity or the FSIA applied, because even under the less stringent theory of immunity codified in the FSIA there would be no implied waiver of immunity, and thus plaintiff's suit against Germany would be barred. In addition — and directly contrary to *Abrams* — the Seventh Circuit, citing to *Amerada Hess*, emphasized that only the FSIA — and not the Alien Tort Claims Act — can be used to obtain subject matter jurisdiction over a

foreign sovereign, even when the acts in question pre-date the passage of the Act. 250 F.3d at 1148, n.2.

In looking at these five cases, the confusion for foreign sovereigns and for the many district courts facing these issues is evident. In both of the D.C Circuit decisions, *Princz* and *Joo*, immunity is upheld, but the two rulings on whether the FSIA can be applied to pre-1952 events are in direct tension. In *Sampson*, the Seventh Circuit also upholds immunity, but relegates its answer to the question about the application of the FSIA to holocaust events to a footnote. The court in *Sampson* also explicitly rejects, in direct conflict with *Abrams*, the view that the Alien Tort Claims Act can provide a basis of jurisdiction for pre-enactment events. In *Altmann*, the Ninth Circuit rejects the claim of immunity by the foreign sovereign, and applies the FSIA to pre-1952 events, stating that there is no impermissible retroactive effect.

In all of these cases except the present one, it is defendants who argue – often with the support of the U.S. executive branch – that particular provisions of the FSIA are "impermissibly retroactive". In this case, however, a ruling that the FSIA applies to the events of World War II would preclude plaintiffs' suit, and thus it is *plaintiffs* who press the argument that it would be impermissibly retroactive to apply the FSIA to bar their suit.

Whether it is plaintiffs or sovereign defendants that urge that the FSIA not be applied to World War II events, the incontrovertible fact is that a conflict prevails among the circuits concerning this question. *One view* is that the Foreign Sovereign Immunities Act, as a jurisdictional statute, does not implicate concerns about retroactivity at all. *A second view* is that various decisions of the Supreme Court concerning retroactive application of statutes (*see* Part III, *infra*) suggest that certain provisions of the FSIA may not be applied – i.e., would be impermissibly retroactive – if the *foreign sovereign* can show that by narrowing the scope of immunity the FSIA

worked a change with respect to its settled expectations.[7] *A third view*, as evidenced in the present case, is that the concerns about impermissible retroactivity may be invoked by *plaintiffs* who claim that they could have brought suit under the preexisting law and practice, even though for more than fifty years they did not do so.

Foreign states and their instrumentalities, as well as potential plaintiffs, need a clear answer about what regime of jurisdiction and immunity is applicable to claims arising from World War II and other catastrophes. The answer should be provided by this Court through a grant of certiorari in this case.

B. Determining the Difference between Practice under the FSIA and Prior Practice.

The decision of the court of appeals in this case is not only in direct conflict with other circuits on the question of whether the Foreign Sovereign Immunities Act applies to events prior to its enactment, but is also in conflict with other circuits in its approach to determining the issue of inconsistency between the FSIA and prior practice.

Both the D.C. Circuit in *Princz* and *Joo*, and the Seventh Circuit in *Sampson* were quite confident that the absolute immunity theory would have prevented suit against a foreign sovereign in the World War II era, even with respect to violations of international law and human rights. They found no reason to ask what position the State Department or the Executive Branch would have taken on the particular facts in those cases.

The Ninth Circuit in *Altmann* adopted a different approach to the determination of pre-1952 immunity. The court of appeals believed that if it were to apply the FSIA to support a claim based on pre-1952 events, it would have to satisfy itself

7. A variation of this view, thus far only evidenced in a district court decision, suggests different treatment of different provisions of the FSIA, depending on the date a particular claim arose. *See Garb v. Republic of Poland*, 207 F. Supp. 2d 16 at 30 (E.D.N.Y. 2002), (*vacated and remanded*, 8/6/03, *see* App. E).

that no legitimate reliance on immunity by the sovereign would be upset. To that end, the court rejected the finding of the courts of appeals in *Princz* and *Sampson* that absolute immunity would have applied to pre-1952 events. Instead, the court concluded that the government of Austria could not have expected that the Department of State would have "recognized and allowed" immunity for the act of expropriation at issue. The court's conclusion was based in large part on a letter written by the State Department in 1949, in a case involving the act of state doctrine and not sovereign immunity. *See* 317 F.3d at 965-66, 327 F.3d at 1246-47.[8]

The Second Circuit in the present case adopted a similar approach in service of a different inquiry. In order to determine whether the FSIA should be applied to bar claims arising from the events of World War II alleged by the plaintiffs, the court held that it must determine whether "*plaintiffs* could have legitimately expected to have their claims adjudicated in the United States prior the FSIA's enactment." (Pet. App. at 24a, 332 F.3d at 186 (italics added). To make that determination, Judge Cardamone was explicit that such an inquiry should resurrect the role of the State Department in immunity practice prior to 1952 (i.e., prior to the Department's adoption of the restrictive theory of immunity):

> Both sides overlook one crucial aspect of the pre-FSIA law and practice in the United States – the State Department's role in courts' foreign sovereign immunity determinations. As earlier noted, the State Department often intervened in litigation by filing a suggestion of immunity. Further, even in cases where the State Department did not intervene, courts looked to that agency for guidance and generally acted in accordance with its policies.

Pet. App. at 25a, 332 F.3d at 187.

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8. It is worth pointing out that the U.S. government entered the case on petition for rehearing, opposing the conclusion reached by the court. However, rehearing was denied.

As discussed in Part IV of this petition, it is difficult to imagine how such an inquiry could be conducted or how one could have confidence in its conclusion. It is also clear that none of the other circuits faced with this issue – nor the State and Justice Departments in their several submissions as amicus – considered such an approach feasible or appropriate.

III. The Court of Appeals Misinterpreted this Court's Decision in *Landgraf* as Applied to the Foreign Sovereign Immunities Act.

A. Failure to See the Clear Intent of Congress.

The court of appeals in the present case laid great stress on this Court's decision in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), concerning retrospective application of statutes. It pointed out correctly that the "presumption against retroactive legislation is rooted in fundamental notions of fairness which dictate that 'settled expectations should not be lightly disrupted.'" (Pet. App. 13a, 332 F.3d at 181, quoting *Landgraf* at 265). But in interpreting this Court's direction in *Landgraf*, the court of appeals made two mistakes.

The first task, as *Landgraf* teaches, is to look at the intent of Congress. In the case of the FSIA, as demonstrated in Part I of this petition, the intent of Congress was clear. The statute was to be comprehensive, and *henceforth* all suits against foreign states of their instrumentalities were to be subject to its provisions, which were carefully designed to balance the needs of American plaintiffs and the traditions of international law.[9] Only by rejecting the plain text of the Act, as well as the unequivocal interpretation of this Court in *Verlinden* and *Amerada Hess*, was the court of appeals able to embark on its meandering path through presumptions and counter-presumptions which winds up in a search for an alleged indefinite custom in the 1940s, to be carried out by the

9. *See, generally, Jurisidiction of United States Courts in Suits against Foreign States*, Report of the House Comm. on the Judiciary, H.R. Rep 94-1487, pp. 6-10 (1976).

lower court. Without any evidence, either in the hearings or legislative reports or in the numerous commentaries before and after passage of the FSIA, that in adopting the FSIA Congress might have wanted to carve out from the Act claims that arose before 1952, the court of appeals concluded that the "rigorous requirement of an unambiguous Congressional direction is not satisfied" (Pet. App. 19a, 332 F.3d at 184); that the statutory language "obviously" is not so clear as to sustain only one construction (*id.*); and that "comprehensive" does not mean comprehensive.[10]

Even if, as the court of appeals said, (Pet. App. 19a, 332 F.3d at 184) the term "henceforth" as used in the "Findings and Declaration Purpose" section of the FSIA is capable of more than one interpretation – "for all suits filed after the effective date" or "for all claims arising out of post-enactment events" – one thing is clear: Congress never contemplated, and never intended, that claims in U.S. courts against sovereign states arising from events during World War II – if they had ever been available – would survive if they did not come within the Act. Only by indulging in a presumption against clarity and in favor of ambiguity does the court of appeals reach the second part of the teaching of *Landgraf* and its progeny.

B. *Landgraf* as Applied to the FSIA.

Even assuming it were necessary to reach the second leg of the *Landgraf* formula, the application by the court of appeals of the presumption against retroactivity to *jurisdictional provisions*, such as § 1330 of the Foreign Sovereign Immunities Act, misconstrues the Court's jurisprudence in this area.

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10. Compare the similar conclusion by the court of appeals in its decision in *Amerada Hess* about the same language in respect to its effect on the Alien Tort Statute – "... Congress did not express a clear intent ...." quoted more fully at p. 8 *supra*, and this Court's response in reversing the court of appeals, – "... we doubt that even the most meticulous drafstman....". also quoted at pp. 8-9 *supra*.

The majority opinion in *Landgraf* explains the distinction between jurisdictional and other types of statutes for purposes of retroactivity analysis:

> Application of a new jurisdictional rule usually "takes away no substantive right but simply changes the tribunal that is to hear the case."[citation omitted]. Present law normally governs in such situations because jurisdictional statutes "speak to the power of the court rather than to the rights or obligations of the parties". 511 U.S. at 274.

The court of appeals in the present case got that message, but failed to apply it correctly. It pointed to this Court's decision in *Hughes Aircraft Co. v. United States*, 520 U.S. 939 (1997) as an instance where this Court refused to exempt a "jurisdictional statute" from the *Landgraf* presumption against retroactivity. (Pet. App. 22a, 332 F.3d at 185-86). But the amendment at issue in *Hughes*, as this Court explained in its opinion, presented a situation quite different from that presented by enactment of the FSIA, in particular from enactment of § 1603(b), which confirmed that for most purposes a state-owned instrumentality would be treated in the same way as the state itself. In *Hughes*, the amendment in question eliminated a defense that would previously have barred plaintiff's action, and thus created a right where none had previously existed. Thus, although the amendment at issue in *Hughes* was phrased in jurisdictional terms, it actually was a substantive provision, and accordingly "as much subject to our presumption against retroactivity as any other." 520 U.S. at 951. In contrast, even assuming that § 1603(b) constituted a change in U.S. law (*See* Part IV, infra), application of the FSIA would neither create nor abrogate any substantive right: it would simply provide that claims without a nexus to the United States could not be pursued against foreign state instrumentalities in a court in the United States.

In his concurrence in *Landgraf*, Justice Scalia, joined by Justices Kennedy and Thomas, explained why such an effect is not a retroactive one:

> . . . the purpose of provisions conferring or eliminating jurisdiction is to permit or forbid the exercise of judicial power – so that the relevant event for retroactivity purposes is the moment at which that power is sought to be exercised. *Thus, applying a jurisdiction-eliminating statute to undo past judicial action would be applying it retroactively; but applying it to prevent any judicial action after the statute takes effect is applying it prospectively.* (italics added).

511 U.S. at 293.

Chief Justice Rehnquist, joined by Justices Scalia, Kennedy, and Thomas, drew a similar distinction in *Lindh v. Murphy*:

> Although in *Hughes Aircraft Co. v. United States ex rel. Schumer*, we recently rejected a presumption favoring retroactivity for jurisdiction-creating statutes, . . . nothing in *Hughes* disparaged our longstanding practice of applying jurisdiction-ousting statutes to pending cases.

521 U.S. 320, 342 n.3 (1997).

It is true, of course, that if the effect of the the FSIA is to create jurisdiction where none existed before, the expectations of foreign sovereigns relying on absolute immunity from suit in the United States might be upset – the so-called "impermissibly retroactive" effect of the FSIA that has led several courts of appeals to refuse to apply the Act to pre-enactment events. *See, e.g.*, the *Carl Marks* and *Jackson* cases discussed in the next section. But there is no "impermissibly retroactive effect" merely because the plaintiff has failed to bring a claim earlier that is now foreclosed.

The discussion by the court of appeals about the unavailability of a state court alternative (Pet. App. 23a-24a, 332 F.3d at 186) also misses the point in the context of allocation of jurisdiction within the international system. The Foreign Sovereign Immunities Act protects foreign sovereigns and their instrumentalities from litigation in the United States without a requisite nexus to conduct or events in the United States. It addresses only the immunity of foreign states from suit in the United States. The FSIA says nothing, however, about the underlying liability of the defendants in an appropriate forum with the proper nexus to the claims. Thus the effect of applying the FSIA in this case is clearly jurisdictional in the *Hughes* sense of the term.[11] To paraphrase Justice Scalia's insight in *Landgraf*, applying the Foreign Sovereign Immunities Act in *Abrams*, as the District Court did, was prospective application of a jurisdictional statute. It did not undo any past judicial action but merely prevented any judicial action once the statute has taken effect.

It is understandable that there has been some uncertainty about the impact of *Landgraf* and succeeding decisions of this Court on the FSIA.[12] The present case offers a suitable vehicle for clarifying this still confused area.

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11. *See Hughes Aircraft Co. v. United States*, 520U.S. 939 at 951:

> Statutes merely addressing *which* court shall have jurisdiction to entertain a particular cause of action can fairly be said merely to regulate the secondary conduct of litigation and not the underlying primary conduct of the parties. [references to *Landgraf* omitted.] Such statutes affect only *where* a suit may be brought, not *whether* it may be brought at all. (italics in original).

12. To take just one more example of misunderstanding in the decision of the court of appeals, in its most recent discussion of retroactivity, *Immigration and Naturalization Service v. St. Cyr*, 533 U.S. 289 (2001), this Court wrote:

> *By itself*, the comprehensiveness of a congressional enactment says nothing about Congress' intentions with

(Cont'd)

C. Failure to Focus on the Expectations of Foreign States.

Discussion about retroactivity with respect to the Foreign Sovereign Immunities Act has generally been directed to a concern with the expectations of foreign states in their relations with the United States. Because immunity under the FSIA is in most respects more limited than the pre-FSIA regime, (and certainly more limited that the pre-1952 regime), most foreign sovereigns and their instrumentalities have assumed that the FSIA would not be applied to raise claims that could not have been raised previously, and plaintiffs seeking to take advantage of the greater opportunity for litigation under the Act have generally been unsuccessful. Put another way, the decisions not to apply the FSIA to the events of World War have upheld the reasonable expectations of states currently in relation with the United States. See, in addition to the *Princz* and *Sampson* cases discussed in Part II, *Jackson v. People's Republic of China*, 794 F.2d 1490 (11th Cir. 1986), *cert. denied*, 480 U.S. 917 (1987); *Carl Marks & Co., Inc. v. Union of Soviet Socialist Republics*, 841 F.2d 26 (2d Cir. 1988) (both concluding that claims by holders of imperial bonds issued seven decades earlier were not sustainable under the FSIA.) In this case, however, the question of retroactivity is turned on its head.

Plaintiffs assert that they would not have been barred from bringing this suit prior to enactment of the FSIA, defendant

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(Cont'd)

> respect to the retroactivity of the enactment's individual provisions. (Italics added).

533 U.S. at 317. In fact, several provisions of the statute at issue in *St. Cyr* contained specific lanuage indicating Congress's intent to apply them retroactively, and the purpose of the italicized words, it appears, was to point out the contrast between those provisions and the amendment challenged by the deportee, which did not contain corresponding language. The court of appeals in the present case quotes this passage (Pet. App. 20a, 332 F.3d at 184-85), but leaves out the italicized words. Of course, the FSIA contains no comparable distinction among its several provisions; its only reference to time of application is the word "henceforth" in § 1602.

strongly disagrees, and the court of appeals says: "The final question is whether *plaintiffs* could have legitimately expected to have their claims adjudicated in the United States prior to the FSIA's enactment." (Pet. App. 24a, 332 F.3d at 186 (italics added). Of course, if plaintiffs thought they could have brought this action prior to 1977, one has to ask why they did not do so. But the point is that focusing on the plaintiffs' expectations misconceives the nature of the FSIA. Judge Cardamone himself wrote, on the same page of the federal reports, of the "sensitivity of actions in American courts against foreign states and the importance of having a uniform, consistent law in this area." (Pet. App. 23a, 332 F.3d at 186, citing the House Report at 32, 1976 U.S.C.C.A.N. at 6631). The present case is the only one that focuses on the plaintiffs' expectations; in contrast, all the other cases, including *Altmann*, where the court denies immunity, as well *Princz*, *Sampson*, *Joo*, *Jackson*, and *Carl Marks*, where immunity is upheld, look to the expectations of the foreign sovereign.

The conflict generated by this case and the splits among the several circuits leave foreign states with great uncertainty – precisely the opposite of one of the principal aims of Congress in adopting the FSIA. Foreign states have relied – and should be permitted to rely – on the only federal statute that has regulated immunity since 1976. The present case puts that reliance in jeopardy.

IV. The Inquiry Ordered by the Court of Appeals on Remand Would Be Both Impracticable and Unjudicial.

As already noted, plaintiffs' entire case depends on the assertion that the Foreign Sovereign Immunities Act of 1976 closed a door to their claims that had previously been open. That assertion runs up against the well-known fact that until 1952 the United States followed the doctrine of absolute immunity for foreign states, i.e., the doctrine that made no distinction between claims arising out of commercial activity and claims arising out of government activity. See, for a concise

summary, *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 at 486-88 (1983). Notwithstanding some resistance in lower U.S. courts and abandonment of the absolute theory of immunity in many other countries (but not the United Kingdom and states following the British model), this Court several times reaffirmed the doctrine in controversies arising out of commercial activities conducted by ships or other government-owned entities. *See Berizzi Brothers Co. v. SS. Pesaro*, 271 U.S. 562 (1926); *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68, 74 (1938) (dictum); *Ex Parte Republic of Peru*, 318 U.S. 578 (1943).[13]

The court of appeals in the present case acknowledged this fact, and also understood that courts in the United States uniformly granted immunity whenever the State Department made a suggestion to that effect. (*See* Pet. App. 6a, 25a, 332 F.2d at 176, 187.) As Chief Justice Stone wrote in *Ex parte Peru*, an action begun by the seizure of a ship, once the Department has allowed the claim of immunity, and has so certified to the district court,

> The certification and the request . . . must be accepted by the courts as a conclusive determination by the political arm of the government that the continued retention of the vessel interferes with the proper conduct of our foreign relations.

318 U.S. at 589.

There were, however, a few instances in which the State Department did not "recognize and allow " a claim of immunity, typically when there was doubt about the ownership or possession of a vessel for which immunity

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13. *See also, e.g.*, American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States*, Pt. IV, ch. 5, subchapter A, Introductory Note (1987).

was claimed.[14] In *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945), the Court, again per Chief Justice Stone, wrote:

> It is . . . not for the courts to deny immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize

324 U.S. at 35.

Seizing on the possibility that the State Department might not have "recognized and allowed" a claim of immunity, the court of appeals in the present case vacated the decision of the district court and remanded the case with instructions to inquire what the Department might or might not have said had the claims been filed in the 1940s. Nothing is stated in the decision about the hypothetical operative date. Would it have been

> – in the first ten months of 1942, when portions of France were occupied and others were under the semi-independent Vichy government with which the United States maintained diplomatic relations;[15] or
>
> – after November 11, 1942, when German troops occupied all of France following the U.S. landings in North Africa; or
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> – the summer of 1943, when the French Committee of National Liberation was formed, including both General de Gaulle and General Giraud; or

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14. *See* Michael H. Cardozo, "Sovereign Immunity: The Plaintiff Deserves a Day in Court," 67 Harv. L. Rev. 608, 609-12 (1954); Andreas F. Lowenfeld, "Litigating a Sovereign Immunity Claim - The *Haiti* Case," 49 N.Y.U. L. Rev. 377, 389-90 (1974).

15. *See* William L. Langer, *Our Vichy Gamble* (1947).

> – the summer of 1944, following the Normandy invasion, when the French Committee of National Liberation led by General de Gaulle was recognized by the United States as the *de facto* civil government of France; or
>
> – January 1, 1945 when France joined the United Nations in full partnership with the United States, the United Kingdom and other states engaged in World War again the Axis Powers; or
>
> – in the post-War period when the United States was leading the effort to rehabilitate Western Europe within the orbit of the Marshall Plan and later the North Atlantic Alliance?

Even if the court could somehow fix on a given date as dispositive, even if service of process and in personam jurisdiction could somehow be deemed to have been possible, which seems doubtful,[16] and even if a basis for subject matter jurisdiction could be found, there would seem to be no way that the record called for by the court of appeals could be established, consistently with the expressed intent of the Congress. If the State Department were asked to make a submission in this case and did so, the result would be directly contrary to the statement in the House Report on what became the FSIA:

> A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby

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16. Nearly all the prior cases against foreign states involved ships, and suit was commenced by libel or other forms of arrest or attachment. Service of process on ambassadors or consuls was prohibited by 22 U.S.C. § 252, repealed in 1978, and there was no provision comparable to § 1608 of the FSIA for service of process on the foreign ministry or through diplomatic channels. *See* Andreas F. Lowenfeld, "Claims against Foreign States - A Proposal for Reform of United States Law." 44 N.Y.U.L. Rev. 901, 921-26 (1969).

> reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process. The Department of State would be freed from pressures from foreign governments to recognize their immunity from suit and from any adverse consequences resulting from an unwillingness of the Department to support that immunity.

H.R. Rep. 94-1487, p. 7, 1976 U.S.C.C.A.N. 6604, 6606. Alternatively, if the State Department were to decline to give a substantive response to a question by the court or by one of the parties, whatever testimony might be elicited from "experts" would inevitably be inconclusive.

Only by speculation well beyond the function of a court could a determination be issued about how a discretionary-function – a blend of foreign policy and legal analysis – would have been carried out in response to a hypothetical suit. It is difficult to imagine how plaintiffs could show that the State Department would have departed from its usual practice of "recognizing and allowing" claims of immunity, or how defendant could show that the Department would not have made an exception, let alone how a court would have reacted to an ambiguous communication from the executive branch.[17] Thus, it would not be the FSIA, but rather the inquiry itself that would be "impermissibly retroactive," because the result of the inquiry would be wholly speculative.[18]

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17. *See* Michael H. Cardozo, note 14 *supra*, at 611-12.

18. It may be noted that plaintiffs' complaint in the present case contains a demand for a jury trial, and in the absence of the FSIA, there would be no rule as to how such a demand should be treated. It seems inconceivable that Congress intended to permit jury trials for pre-1976 or pre-1952 claims, while authorizing only nonjury civil actions for claims against foreign sovereigns arising after 1976. *See* FSIA § 1330(a).

So far as Petitioner is aware, the mandate to the trial court calling for the film of history to be run in reverse is without precedent. However, since the decision of this case, a different panel of the Second Circuit has followed the example set in *Abrams*, and has remanded two other cases involving claims against foreign sovereigns for injuries sustained during or shortly after World War II. *Garb v. Republic of Poland*, and *Whiteman v. Republic of Austria* (2d Cir. Summary Order 6 August 2003, repr. at Pet. App. E). The court of appeals instructed two different district courts to make "determinations of the Department of State's policy prior to FSIA with respect to sovereign immunity for Poland and Austria in the circumstances presented in each of the instant cases." The court wrote:

> We note that on remand there exists the possibility that specific evidence of the Department of State's position with respect to a particular country during a given period of time and in the circumstances presented may not exist, and thus that we may generally be forced to rely for such factual determinations on the overarching policies of the Department of State prior to the FSIA, which we acknowledged in *Abrams*. . . . Before so relying, however, we remand to give the parties the opportunity to present particular evidence relevant to the Department of State's position on the sovereign immunity of the nation whose conduct is in question in their particular cases. We direct the District Courts to invite the participation of the Department of State in developing a record to support their determinations.

Pet. App. at 107a.[19] In Petitioner's submission, the order of the Court of Appeals does nothing to refute the arguments

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19. In a footnote accompanying this passage, the court cautioned the District Courts to conduct its inquiry with appropriate attention to separation of powers concerns, citing *American Insurance Association v. Garamendi*, 538 U.S. __, 123 S. Ct. 2374 (2003).

here made, but confirms that this case is not a unique one. The situation presented is likely to come up with increasing frequency, with unpredictable and possibly inconsistent results. Accordingly, before resources both of the judiciary and the executive branch are expended in fruitless investigation, review should be granted in the present case.

CONCLUSION

If this case were to stand unreviewed, the doors would open for a multitude of claims going back to World War II that previously were thought to be barred by sovereign immunity. Not only France, but virtually every country in Europe, including Russia, plus China, Japan, and numerous Middle Eastern states might be made defendants in the United States for alleged violations of human rights prior to 1976, both by American plaintiffs and by aliens. The inquiry directed by the court of appeals into what the State Department might have done in this case, and in the cases to follow, would inevitably drag the State Department back into civil litigation — the opposite of a principal aim of the Foreign Sovereign Immunities Act — and would inevitably interfere with the conduct of foreign relations by the executive branch. Accordingly, it is important that the issues raised by the present case be resolved in this proceeding, before the process expands beyond the possibility of control.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED JUNE 13, 2003

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2002

(Argued: October 3, 2002 Decided: June 13, 2003)

Docket No. 01-9442

RAYMONDE ABRAMS, NICOLE B. SILBERKLEIT, JANET HERMAN, LILY REDNER, BERNARD CARON, ERNEST HAAR, HARRY CYBULSKI, YVONNE LITMAN, CASSANDRA KIRBY CONAHAY FREUND, JEAN JACQUES FRAENKEL, LILIANE LICHTENSTEIN, MARIE WEINRAUCH,

Plaintiffs-Appellants,

– v. –

SOCIÉTÉ NATIONALE DES CHEMINS DE FER FRANCAIS,

Defendant-Appellee.

Before:

CARDAMONE, MINER, AND SOTOMAYOR,

Circuit Judges.

* * *

CARDAMONE, *Circuit Judge.*

The named plaintiffs have brought this action individually and on behalf of other similarly situated Holocaust victims and their heirs against the French railroad company Société Nationale des Chemins de Fer Francais

(SNCF or railroad). The action arises out of SNCF's 1942-1944 operation of trains that transported tens of thousands of French civilians to the infamous Nazi death and slave labor camps. Plaintiffs allege that in so doing SNCF committed war crimes and crimes against humanity under customary international law and the law of nations. Customary international law, plaintiffs further allege, is enforceable in federal district court as federal common law.

Plaintiffs filed their complaint in the United States District Court for the Eastern District of New York before Judge David G. Trager on September 12, 2000. When SNCF moved to dismiss it for lack of subject matter jurisdiction, the district court granted the motion, ruling that SNCF was an "agency or instrumentality of a foreign state" as that term is defined in the Foreign Sovereign Immunities Act of 1976 (FSIA or Act), 28 U.S.C. § 1603(b), and that, because plaintiffs' claims did not fall within any of the Act's exceptions to foreign sovereign immunity, it was without jurisdiction to adjudicate them. *Abrams v. Société Nationale des Chemins de Fer Francais*, 175 F. Supp. 2d 423, 428-29, 450 (E.D.N.Y. 2001). On appeal, as in district court, plaintiffs urge that the FSIA does not apply to this case because it arises out of events predating the statute's 1976 enactment.

BACKGROUND

The following facts are alleged in the complaint and are accepted as true, as they must be at this stage of the litigation. SNCF, the national railway of France, was created in the late 1930s by consolidation of five then-existing French regional rail networks. Today it is operated as a separate legal entity wholly-owned by the French government. During the Nazi occupation of France the railroad remained under civilian control and preserved its independence by collaborating with the German authorities and by accommodating their transportation needs.

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In March 1942 at the request of those authorities, SNCF began to operate trains deporting Jews and other so-called "undesirables" from France to Nazi concentration camps. In exchange for this assistance, the railroad was allowed to continue its operations and was paid for the transport it provided. The conditions inside the deportation trains were inhumane and frequently fatal to passengers who were often carried in cattle cars. Sanitation facilities were limited or nonexistent and passengers had to endure extreme heat and cold. Many did not live to the journey's end. By the time the Nazi occupation of France was over, SNCF had conveyed more than 72 deportation convoys, taking to concentration camps 75,000 Jews and tens of thousands of others. Fewer than three percent of those deported survived. The trains' ultimate destinations included unspeakable places like Dachau and Auschwitz, and these destinations and the conditions of travel were well known to those running the railroad.

The named plaintiffs are either survivors of those deportations or their heirs and descendants. They commenced suit against SNCF both in their individual capacities and on behalf of a putative class of all members of the civilian population of France transported by SNCF to the Nazi camps, and their respective heirs and beneficiaries. The complaint sought compensatory and punitive damages as well as disgorgement of wrongfully obtained profits.

The railroad moved to dismiss the complaint on two grounds: first, it asserted that federal courts in the United States had no subject matter jurisdiction over plaintiffs' causes of action; second, it contended it was entitled to sovereign immunity, both under the FSIA and under the laws in effect during World War II. In support of its motion, SNCF submitted affidavits from its attorneys containing information regarding the railroad's present organization and ownership. The railroad's attorneys confirmed that it is now organized as a separate legal entity, which is wholly-owned and controlled by the French government.

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In opposing the motion to dismiss their complaint, plaintiffs contended that applying the Act to their claims would be impermissibly retroactive, and that questions of jurisdiction and immunity should be resolved based on laws in effect in the 1940s at the time the railroad's underlying conduct occurred. Under those laws, plaintiffs maintain, SNCF was not entitled to sovereign immunity because it was organized as a corporate entity separate and distinct from the French government. Plaintiffs also cross-moved for discovery, declaring that whether SNCF is entitled to immunity cannot be resolved based on the existing record.

In granting SNCF's motion to dismiss and denying plaintiffs' cross-motion for discovery the district court first found that the railroad fits on all fours into the definition of an agency or instrumentality of a foreign state under the terms of the Act. Substantially adopting the reasoning in *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994), it further ruled that, to the extent that the Act defines the scope of federal courts' jurisdiction over claims against foreign states, the statute applies to actions commenced after its enactment regardless of when the underlying conduct occurred. The district court further ruled that the FSIA's jurisdictional grant does not encompass plaintiffs' cause of action. *Abrams*, 175 F. Supp.2d at 450. It found it unnecessary to decide whether plaintiffs could have brought their cause under laws in effect in the 1940s. *Id.* at 446.

Although we agree with the district court that SNCF is an agency or instrumentality of France under the FSIA, the existing record is insufficient for us to resolve the question of whether that Act's application to plaintiffs' causes of action would be impermissibly retroactive. Hence, we vacate and remand.

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DISCUSSION

I Standard of Review

Upon reviewing a district court's determination with respect to its subject matter jurisdiction under the FSIA, we examine the court's legal conclusions *de novo* and its factual findings for clear error. *Robinson v. Gov't of Malay.*, 269 F.3d 133, 138 (2d Cir. 2001). Because the district court did not have to make any factual findings, and dismissed the complaint solely on its resolution of questions of law, our review is *de novo*.

II Foreign Sovereign Immunity in Federal Courts

A. *Prior to the FSIA's Enactment*

Foreign sovereign immunity has been a recognized doctrine of American law since the seminal Supreme Court case *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). In *The Schooner Exchange*, two American citizens claimed ownership of a ship they alleged had been wrongfully seized by the French navy. The United States Attorney for the District of Pennsylvania filed a suggestion of immunity with the district court, thereby raising a question of sovereign immunity. *Id.* at 117-18. The Supreme Court agreed that immunity existed and dismissed the Americans' claim to the ship. *Id.* at 147. In an opinion by Chief Justice Marshall, the Court explained that the "perfect equality and absolute independence" of sovereign nations required that United States courts refrain from exercising jurisdiction over claims against other states. *Id.* at 137.

From that beginning until the FSIA's enactment in 1976, the executive branch played a prominent role in deciding whether a foreign sovereign was immune from suit in American courts. *See Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 486-87 (1983); Restatement (Third) of Foreign Relations Law of the United States [hereafter Restatement

3d] pt. IV, ch. 5, subch. A, introductory note (1987). Foreign states sued in the United States often requested that the Department of State ask the Department of Justice to file a suggestion of immunity with the courts. *See* Restatement 3d, pt. IV, ch. 5, subch. A, introductory note.

Courts, for their part, usually deferred to the decision of the executive, reasoning that the preferable method of resolving disputes with friendly foreign states is not litigation but diplomatic negotiation, a matter within the authority and expertise of the executive branch. *See Ex parte Republic of Peru*, 318 U.S. 578, 586-87 (1943); *see also Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945) (reasoning that "the courts should not so act as to embarrass the executive arm in its conduct of foreign affairs"). In the 1940s, the Supreme Court expressly endorsed deference to the executive as "a guiding principle in determining whether a court should exercise or surrender its jurisdiction in such cases." *Hoffman*, 324 U.S. at 35; *see also Peru*, 318 U.S. at 586-87 (accepting a claim of immunity where the Secretary of State had undertaken to settle the dispute through diplomatic channels).

Prior to 1952, the United States adhered to the absolute theory of foreign sovereign immunity. *See* Restatement 3d, pt. IV, ch. 5, subch. A, introductory note. Under that theory, a sovereign cannot be sued in the courts of another state without that sovereign's consent, regardless of the nature of the activity giving rise to the action. *See* Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Philip B. Perlman, Acting Attorney General of the United States (May 19, 1952) [hereafter Tate Letter], *reprinted in Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711-15 (1976). As foreign states increasingly began to participate in international commerce, an alternative to the theory of absolute immunity emerged called the restrictive theory of sovereign immunity. *See* Restatement 3d pt. IV, ch. 5, subch. A, introductory note. Under that theory, a foreign state is immune from claims arising out of the state's

governmental activities, but not immune from claims arising out of its commercial activities. *See id.* § 451, cmt. a. The United States adopted the restrictive theory in 1952 when the Department of State announced its formal change of policy in a letter from Acting Legal Adviser Jack Tate to the Acting Attorney General. *See* Tate Letter, *reprinted in Alfred Dunhill*, 425 U.S. at 714.

After the Tate Letter, the State Department continued to decide most of foreign states' immunity claims. In those cases where the foreign government did not request the State Department's intervention, the duty to resolve the immunity question in the first instance fell to the courts. *Verlinden*, 461 U.S. at 487. Sovereign immunity determinations were thus made in two different branches of government resulting in rules that were neither clear nor uniform. *Id. at 488; see also* Danny Abir, *Foreign Sovereign Immunities Act: The Right to a Jury Trial in Suits Against Foreign Government-Owned Corporations*, 32 Stan. J. Int'l L. 159, 165 (1996) (discussing difficulties in application of the restrictive theory between 1952 and 1976); William R. Dorsey, III, *Reflections on the Foreign Sovereign Immunities Act After Twenty Years*, 28 J. Mar. L. & Com. 257, 259-60 (1997) (same). Litigation of claims against foreign states was further complicated by the absence of effective procedures for service of process and by the lack of satisfactory standards for execution of judgments against foreign states. *See* Abir, *supra*, at 165; Dorsey, *supra*, at 260.

As a result of these inadequacies Congress in 1976 enacted the FSIA, a statute aimed "to free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to 'assur[e] litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process.'" *Verlinden*, 461 U.S. at 488 (quoting H.R. Rep. No. 94-1487, at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6606).

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B. *The FSIA*

The Act was designed to codify the restrictive theory of sovereign immunity and to remove the subject from diplomatic pressures by transferring such decisions to the judiciary. Standards were imposed for serving process, obtaining personal jurisdiction, and executing judgment in an action against a foreign state. *See* H.R. Rep. No. 94-1487 [hereafter House Report], at 7-8 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605-06. For purposes of our analysis, the Act can be divided into three main parts: (1) statement of jurisdiction of the federal courts, (2) exclusions from jurisdiction and definition of immunities, and (3) other standards and rules. *See* Restatement 3d pt. IV, ch. 5, subch. A, introductory note. While the third group of provisions is largely irrelevant in the instant case, the first two parts warrant a brief overview.

1. *Statement of Jurisdiction*

The FSIA added to Title 28 of the United States Code a new jurisdiction- conferring provision, § 1330. Section 1330 granted federal district courts "original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title [the immunity-defining provisions] or under any applicable international agreement." Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, § 2, 1976 U.S.C.C.A.N. (90 Stat.) 2891, 2891 (codified at 28 U.S.C. § 1330). The statutory definition of a foreign state includes its agencies and instrumentalities. *See* 28 U.S.C. § 1603(a).

The FSIA also amended the diversity jurisdiction provision, § 1332. That amendment eliminated jurisdiction over actions against foreign states, and this section refers now only to suits where a foreign state is a plaintiff.

See FSIA § 3, 1976 U.S.C.C.A.N. (90 Stat.) at 2891 (codified at 28 U.S.C. § 1332). The House Report explained that, because under the FSIA "jurisdiction in actions against foreign states is comprehensively treated by the new section 1330, a similar jurisdictional basis under section 1332 [became] superfluous." House Report at 14, *reprinted in* 1976 U.S.C.C.A.N. at 6613.

The Act did not expressly amend other jurisdiction-granting statutes. In *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), the Supreme Court rejected an argument that this silence indicated Congress' intent to retain claims against foreign states within the scope of jurisdictional provisions other than the new § 1330, such as the general admiralty and maritime jurisdiction statute, 28 U.S.C. § 333(1), or the Alien Tort Claims Statute, 28 U.S.C. § 1350. Relying on the FSIA's comprehensiveness, as well as on its language and legislative history, the Court held that, after the FSIA's enactment, that statute "provides the sole basis for obtaining jurisdiction over a foreign state in federal court." *Id.* at 439. Further, Congress did not have to amend all other existing jurisdictional statutes to ensure the Act's exclusivity. Unlike the diversity provision, other statutes conferring jurisdiction in general terms on district courts had not previously expressly provided for suits against foreign states. *Id.* at 437 n. 5. Thus, the Court concluded, Congress stated that " '[c]laims of foreign states to immunity should *henceforth* be decided by courts of the United States in conformity with [the FSIA],' and very likely it thought that should be sufficient." *Id.* at 437-38 (quoting 28 U.S.C. § 1602).

2. *Exclusions From Jurisdiction and Definition of Immunities*

The Act added to Title 28 a new chapter, §§ 1602-1611, in which it set out a comprehensive set of standards for federal and state courts' determinations of foreign sovereigns' claims of immunity. *See* FSIA § 4, 1976

U.S.C.C.A.N. (90 Stat.) at 2891-97 (codified at 28 U.S.C. §§ 1602-1611); House Report at 14, *reprinted in* 1976 U.S.C.C.A.N. at 6613. The newly added § 1604 declares that, subject to existing international agreements to which the United States was a party at the time of the FSIA's enactment, foreign states are immune from the federal and state courts' jurisdiction unless the FSIA itself provides otherwise. *See* § 1604.

Section 1605 then lists general exceptions to immunity consistent with the restrictive theory. *See id.* § 1605. For example, it provides that foreign states are not immune from claims arising out of their commercial activities within the United States or out of their commercial activities elsewhere that cause a direct effect in the United States. *See id.* § 1605(a)(2). Sections 1606 and 1607 address the scope of foreign states' exposure to liability for punitive damages and to counterclaims. *See id.* §§ 1606-07.

III Role of the FSIA in This Appeal

In their complaint plaintiffs alleged federal subject matter jurisdiction under two statutes: the federal question statute, 28 U.S.C. § 1331, and the Alien Tort Claims Statute, 28 U.S.C. § 1350, which confers on district courts original jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States," *id.* The Supreme Court's holding in *Amerada Hess* instructs that, if the FSIA applies, neither of the mentioned statutes can serve as a jurisdictional predicate for this action, and district courts may entertain the case based solely on the jurisdictional provision of the FSIA, 28 U.S.C. § 1330. 488 U.S. at 443. As noted, that section gives district courts jurisdiction over claims against foreign states only when such claims fall within the FSIA's exceptions to the general grant of immunity for foreign states.

Here, the trial court ruled that none of those exceptions applies. Plaintiffs do not contest this ruling, agreeing that

if the FSIA applies, the district court has no jurisdiction. The thrust of their argument is that the FSIA does not apply to their claims. Thus, we turn now to the first of the two issues determinative of the Act's applicability—SNCF's status as a state actor.

IV Railroad's Status as French Agency or Instrumentality

Because the Act applies to claims brought against foreign states, their political subdivisions, and their agencies and instrumentalities, *see* 28 U.S.C. § 1603(a), deciding whether it applies in this case presents the threshold issue of whether SNCF is an agency or instrumentality of France. The district court concluded that it is. We agree.

Under the Act, an entity is an agency or instrumentality of a foreign state if it meets the following three requirements: first, it must be "a separate legal person, corporate or otherwise"; second, it must be "an organ of a foreign state or political subdivision thereof, or a majority of [its] shares or other ownership interest [must be] owned by a foreign state or political subdivision thereof"; third, it must be "neither a citizen of a State of the United States . . . nor created under the laws of any third country." *Id.* § 1603(b).

In the case at hand, the complaint and the documents submitted by the parties clearly establish that SNCF has had the required characteristics of an agency or instrumentality of France throughout the course of this litigation. It is undisputed that SNCF is now—and was at the time the complaint was filed—a separate legal entity, wholly-owned by the French government, neither organized under the laws of any third country nor a citizen of any state of the United States.

The evidence in the record does not establish, however, that SNCF also had these three characteristics during World War II. For example, though the railroad's brief asserts that the French state owned 51 percent of the company between

1938 and 1982, no affidavits or documents in the record support this statement. This absence of proof regarding the railroad's status during World War II raises the question: Is the fact that the defendant entity fits the FSIA's definition of an agency or instrumentality of a foreign state at the time of the litigation sufficient to require the Act's application to the case, regardless of that entity's organization and ownership at the time of the alleged wrongdoing?

The issue was unresolved in our Circuit both at the time of the district court's decision in this case and at the time the parties briefed and argued the present appeal. After the oral argument, however, the Supreme Court decided *Dole Food Co. v. Patrickson*, 123 S. Ct. 1655 (2003), holding unequivocally that an entity's status as an instrumentality of a foreign state should be "determined at the time of the filing of the complaint." *Id.* at 1663. Because the record clearly establishes that SNCF was an agency or instrumentality of France at the time the complaint was filed, it is an agency or instrumentality of a foreign state as defined in § 1603(b).

V Retroactivity

We pass now to the second question that we must resolve: whether the Act may be applied to this case even though the underlying events occurred before that statute's enactment. Citing the Supreme Court's decisions in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), and *Hughes Aircraft Co. v. United States*, 520 U.S. 939 (1997), plaintiffs declare Congress did not unequivocally express its aim that the Act apply to pre-enactment events. In the absence of such an unequivocal statement, they continue, application of the statute to their claims would be impermissibly retroactive as it would impair their antecedent rights and settled expectations. We agree there is no unequivocal statement, but find the existing record insufficient to assess the accuracy of plaintiffs' retroactivity argument.

Appendix A

A. *Governing Legal Principles*

1. Landgraf/Lindh *Framework*

In *Landgraf,* the Supreme Court established a two-step approach to determining whether a statute applies to events predating its enactment. First, a court must ask "whether Congress has expressly prescribed the statute's proper reach." 511 U.S. at 280. If Congress has done so, the inquiry ends. If not, the court must determine whether applying the statute to pre-enactment events "would have retroactive effect, *i.e.,* whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* If the statute's application would have such an effect, the court must decline to apply it. *Id.* This traditional presumption against retroactive legislation, *Landgraf* explained, is rooted in fundamental notions of fairness which dictate that "settled expectations should not be lightly disrupted" and "that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Id.* at 265.

Lindh v. Murphy, 521 U.S. 320 (1997), elaborated on *Landgraf,* holding that the normal rules of construction generally apply when a court determines the temporal reach of a statute. *Id.* at 326. Absent a clear and express Congressional directive to apply a statute retroactively, the Court stated, applying a statute to pre-enactment events may be inappropriate for more than one reason. First, as discussed in *Landgraf,* such application could produce a retroactive effect, and therefore be barred by the customary presumption against retroactivity. In addition, other regular rules of statutory interpretation could "remove even the possibility of retroactivity," by revealing that Congress planned solely for a prospective application. *Id.* For example, in *Lindh,* an amendment to the habeas corpus statute was held inapplicable to non-capital cases pending at the time of the amendment's enactment. The Court noted

that a simultaneously enacted provision on capital cases expressly required application to then-pending cases, and reasoned that this express requirement, by negative implication, showed that the amendments pertinent to non-capital cases were meant to apply only to cases filed after the amendments' enactment. *Id.* at 326-37.

After *Lindh*, therefore, a court faced with a retroactivity claim that survived the first step of the *Landgraf* analysis may not have to decide whether the statute produces a retroactive effect. Instead, by referring to other rules of statutory interpretation, the court may find the statute inapplicable to pre-enactment events.

2. *Applicability of* Landgraf *to New Jurisdiction-Allocating Legislation*

SNCF avers the *Landgraf* analysis does not apply to those aspects of the FSIA that govern federal courts' jurisdiction, that is, the enactment of the exclusive jurisdictional basis for claims against foreign states set out in § 1330 and the simultaneous exclusion of such claims from other general jurisdictional provisions. We disagree with the railroad's contention.

In *Landgraf*, the Supreme Court recognized that, "[e]ven absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many situations." 511 U.S. at 273. The Court noted jurisdiction-conferring and jurisdiction-ousting statutes as an example of statutes often properly applied to pre-enactment events. "Application of a new jurisdictional rule," the Court instructed, "usually takes away no substantive right but simply changes the tribunal that is to hear the case." *Id.* at 274. Further, "[p]resent law normally governs in such situations because jurisdictional statutes speak to the power of the court rather than to the rights or obligations of the parties." *Id.*

Landgraf did not suggest that *all* jurisdiction-defining statutes should be applied to *all* currently pending lawsuits, or that courts do not have to consider the effects of having such statutes cover pre-enactment events. To the contrary, the Court's use of the adverbs "usually" and "normally" suggests that it did not intend to create a categorical exception from the general retroactivity analysis for jurisdictional statutes.

Three years later, in *Hughes Aircraft*, the Court confirmed that the general presumption against retroactivity affects jurisdiction-allocating statutes to the same extent that it affects other legislation. 520 U.S. at 950-51. At issue in *Hughes Aircraft* was the temporal reach of a 1986 amendment to the False Claims Act that expanded the range of circumstances in which private parties can bring suit "on behalf of the United States against anyone submitting a false claim to the Government." *Id.* at 941. After conducting the two-step analysis outlined in *Landgraf*, the Supreme Court concluded that the 1986 amendment did not apply where the defendant submitted the alleged false claims before 1986 and a private person could not have brought suit based on those claims under the pre-amendment version of the False Claims Act. *Id.* at 946-51.

In rejecting plaintiff's argument that the 1986 amendment, as a jurisdictional statute, was exempt from the *Landgraf* presumption against retroactivity, the Supreme Court clarified *Landgraf*, stating

> The fact that courts often apply newly enacted jurisdiction-allocating statutes to pending cases merely evidences certain limited circumstances failing to meet the conditions for our generally applicable presumption against retroactivity, not an exception to the rule itself. . . . As we stated in *Landgraf*:

> "Application of a new jurisdictional rule usually 'takes away no substantive right but simply changes the tribunal that is to hear the case.' Present law normally governs in such situations because jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties.'"

> Statutes merely addressing *which* court shall have jurisdiction to entertain a particular cause of action can fairly be said merely to regulate the secondary conduct of litigation and not the underlying primary conduct of the parties. Such statutes affect only *where* a suit may be brought, not *whether* it may be brought at all. The 1986 amendment, however, does not merely allocate jurisdiction among forums. Rather, it *creates* jurisdiction where none previously existed; it thus speaks not just to the power of a particular court but to the substantive rights of the parties as well. Such a statute, even though phrased in "jurisdictional" terms, is as much subject to our presumption against retroactivity as any other.

Id. at 951.

In light of the quoted passage from *Hughes Aircraft*, the railroad's argument that we should apply the jurisdiction-allocating aspects of the Act to pre-1976 events without first engaging in the *Landgraf* analysis is misplaced. Nor are we persuaded by the railroad's view that the quoted passage pertains only to jurisdiction-creating statutes, and thus does not apply to the jurisdiction-ousting aspects of the FSIA, that is to say, the express amendment of the diversity statute and the implied limitation on other general jurisdictional grants recognized in *Amerada Hess*. As discussed in Part II B. above, the enactment of the Act's jurisdiction-conferring provision for claims against foreign states in § 1330 is the

very reason that other jurisdictional grants no longer govern such claims. Hence, Congress plainly aimed to have the FSIA's jurisdictional ouster applied coextensively with its jurisdictional grant.

More importantly, the railroad's argument misses the central point of the quoted passage from *Hughes Aircraft:* although jurisdictional statutes are often applied to pre-enactment events, they are not categorically exempt from the *Landgraf* analysis. If the particular jurisdictional statute "affect[s] only *where* a suit may be brought, not *whether* it may be brought," its application to all currently pending cases usually will not have the impermissible retroactive effect discussed in *Landgraf* and, therefore, will "fail[ ] to meet the conditions for our generally applicable presumption against retroactivity." *Hughes Aircraft*, 520 U.S. at 951; *cf. Scott v. Boos*, 215 F.3d 940, 944-47 (9th Cir. 2000) (rejecting as impermissibly retroactive application of new statute that, although phrased as an exception to existing federal jurisdictional provision, barred plaintiff from asserting in state or federal court a claim he could have pursued at the time of the alleged misconduct); *Mathews v. Kidder, Peabody & Co., Inc.*, 161 F.3d 156, 163-66 (3d Cir. 1998) (same).

3. Princz

In urging us to forgo the *Landgraf* analysis, SNCF relies heavily on *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994). In *Princz*, the plaintiff, a Holocaust survivor, sued the Federal Republic of Germany for injuries suffered in Nazi concentration camps during World War II. *Id.* at 1168. Dismissing plaintiff's claims for lack of subject matter jurisdiction, the District of Columbia Circuit stated that it did not need to decide whether the FSIA applied to the case. *Id.* at 1168, 1171. If the statute applied, the court reasoned, plaintiff's claims had to be dismissed because they did not fall within any of the FSIA's exceptions to immunity. *Id.* at 1171. On the other hand, if the Act did not apply,

plaintiff's claims still had to be dismissed because "there [was] no present basis for subject matter jurisdiction over Mr. Princz's claims in the district court regardless of the state of the circuit law concerning immunity in the period 1942-1945." *Id.* at 1175-76. After the FSIA's enactment, the court continued, the diversity statute, § 1332, no longer encompasses claims against foreign states. At the same time, the new *§ 1330* jurisdictional provision of the Act, "asserts federal jurisdiction over a suit against a foreign state only insofar as the foreign state is not entitled to immunity under the FSIA," and the court had already found no pertinent exception to immunity. *Id.* at 1176.

We are unable to agree with the *Princz* court's view that it did not have to and in fact did not decide the issue of the FSIA's applicability. To the contrary, in the second prong of its analysis the majority clearly applied both the FSIA's new jurisdiction-conferring provision, § 1330, and the amended, post-FSIA version of the diversity statute, 28 U.S.C. § 1332.

Further, *Princz* did so without answering either of the two questions posed by *Landgraf*: (1) has Congress clearly expressed its intent that these FSIA provisions be applied to lawsuits based on pre-1976 events, and, if not, (2) would the application of these provisions to the plaintiff's claims have a retroactive effect. Instead, *Princz* noted only that it was not aware of any case law "suggesting that a court can revive the pre-FSIA diversity jurisdiction" over claims against foreign states. 26 F.3d at 1171. Thus, it apparently accepted as axiomatic that the basis for federal subject matter jurisdiction must be found among the jurisdiction-conferring statutes in effect at the time of the lawsuit. As we explained above, in our view such an approach cannot be reconciled with the Supreme Court's discussion of jurisdiction-allocating statutes in *Landgraf* and, more recently, in *Hughes Aircraft*.

In consequence, we decline the railroad's invitation to adopt the reasoning of *Princz* and proceed instead to analyze

the Act's applicability to this case under the analytical framework outlined in *Landgraf* and *Lindh*.

B. Landgraf/ Lindh *Analysis Applied*

1. *Express Command Lacking to Apply FSIA Retroactively*

Under *Landgraf*, the first question is whether Congress clearly expressed its aim that the statute apply to pre-enactment events. We conclude it did not. In *I.N.S. v. St. Cyr*, 533 U.S. 289 (2001), the Supreme Court explained that the standard for finding the requisite "unambiguous direction" under *Landgraf* "is a demanding one." *Id.* at 316. "Cases where this Court has found truly 'retroactive' effect adequately authorized by statute have involved statutory language that was so clear that it could sustain only one interpretation." *Id.* at 316-17 (quoting *Lindh*, 521 U.S. at 328 n. 4). For instance, we found this standard satisfied in *Kuhali v. Reno*, 266 F.3d 93 (2d Cir. 2001), where a statute expanding the definition of the term "aggravated felony" expressly stated that the new definition applies "regardless of whether the conviction was entered before, on, or after" the date of the statute's enactment. *Id.* at 110.

In the case at hand, the rigorous requirement of an unambiguous Congressional direction is not satisfied. The closest Congress came to defining expressly the temporal reach of the FSIA was to state that "[c]laims of foreign states to immunity should *henceforth* be decided by courts of the United States and of the States in conformity with the principles set forth in [that statute]," 28 U.S.C. § 1602 (emphasis added). *See Princz*, 26 F.3d at 1170. The use of the word "henceforth" can reasonably sustain more than one construction. Courts have in fact reached diametrically opposite conclusions regarding Congressional purpose after pouring meaning into this word. *See id.* at 1178 (Wald, J., dissenting) (collecting cases). Some have interpreted the verbiage as suggesting that the Act should

cover all cases decided after its enactment, regardless of the time of the underlying events. *See id. at 1170* (majority opinion). Others have concluded that the word "henceforth" suggests prospective application, meaning application only to suits arising out of post-enactment events—*i.e.*, to some but not all suits filed after the statute's enactment. *See Jackson v. People's Republic of China*, 794 F.2d 1490, 1497 (11th Cir. 1986).

Thus, the statutory language obviously is not so clear as to sustain only one construction and thereby to resolve conclusively the question of Congressional purpose, making additional analysis unnecessary. *Cf. id.* at 1497-98 (proceeding to analyze the FSIA's legislative history, implications of its effective date provision and effect of its application on defendant's antecedent rights to decide whether the statute should apply to claim arising out of pre-1952 events).

The railroad also insists the FSIA's comprehensiveness shows Congress wanted the statute to apply to all suits filed after its enactment. This proposition is not persuasive in light of the Supreme Court's express pronouncement in *St. Cyr* that the comprehensiveness of a statute says nothing with respect to Congress' view regarding the "retroactivity of the enactment's individual provisions." 533 U.S. at 317.

2. *Intent to Apply Prospectively*

We next turn to the question added to the *Landgraf* analysis in *Lindh:* do ordinary methods of statutory construction establish that the Act's jurisdictional provisions are inapplicable to the pre-enactment events here at issue? We think the answer to that question is no.

As just discussed, Congress' statement that the Act should henceforth govern immunity determinations is ambiguous. Similarly unilluminating is the use of the verb

"shall" in the phrase "district courts shall have original jurisdiction . . . of any nonjury civil action against a foreign state." 28 U.S.C. § 1330(a). Just as the word henceforth does not necessarily indicate prospective application only, this language does not necessarily signal the statute's applicability only to cases arising out of post-enactment events. Consequently, the use of the cited statutory language may not eliminate the option of retroactive applicability of the statute.

Plaintiffs further maintain that Congress indicated the Act was not retroactive by postponing its effective date for 90 days after enactment "to give adequate notice of the act and its detailed provisions to all foreign states." *See* FSIA § 8, 1976 U.S.C.C.A.N. (90 Stat.) at 2898; House Report at 33, *reprinted in* 1976 U.S.C.C.A.N. at 6632. We do not discern in this provision any suggestion of the intended temporal reach of the statute. Nor do we consider Congress' inclusion of express retroactivity directives in the 1996 and 1997 amendments to the Act a sound basis for construing a different legislature's silence on the same subject ten years earlier. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221, 1996 U.S.C.C.A.N. (110 Stat.) 1214, 1241-43 (making amendments on lawsuits against "terrorist states" applicable "to any cause of action arising before, on, or after the date of the enactment of this Act"); Jurisdiction for Lawsuits Against Terrorist States: Technical Correction, Pub. L. No. 105-11, 1997 U.S.C.C.A.N. (111 Stat.) 22, 22 (same).

3. *Retroactive Effect*

Because other tools of statutory interpretation do not establish the FSIA's inapplicability to this case, we must consider whether its application here would have the retroactive effect described in *Landgraf* and, accordingly, would be barred by the general presumption against retroactivity. What is called for is "a commonsense, functional judgment about whether the new provision

attaches new legal consequences to events completed before its enactment." *St. Cyr*, 533 U.S. at 321.

Plaintiffs declare that having the Act cover the instant case would be impermissibly retroactive because, under laws in effect during World War II, SNCF would not have been immune from this specific suit. Thus, plaintiffs assert, application of the Act to bar their claims deprives them of a right of action they previously had and upsets their settled and legitimate expectation of being able to sue SNCF in the United States.

In *Hughes Aircraft*, the Supreme Court distinguished between two types of nominally jurisdictional statutes. 520 U.S. at 951. Those statutes that affect only where a suit may be brought can generally be applied to currently pending cases without impermissible retroactivity. *Id.* By contrast, statutes that affect whether a lawsuit may be brought at all can produce a retroactive effect if applied to pre-enactment events. *Id.*

Consistent with *Hughes Aircraft*, at least two other circuits have concluded that a new statute has a retroactive effect under *Landgraf* if the statute, although phrased in jurisdictional terms, does not merely change the forum available to plaintiff, but effectively deprives plaintiff of a claim. *See Scott*, 215 F.3d at 944-47; *Mathews*, 161 F.3d at 163-66. We adopt this view and hold that the FSIA's application to the present litigation would be retroactive in the *Landgraf* sense if, as plaintiffs contend, it fully barred claims that previously could have been adjudicated in the United States.

The question remains therefore whether the Act's application effectively extinguishes plaintiffs' causes of action. In our view, it does. We recognize that, unlike the immunity provisions, the jurisdictional provisions of the Act do not apply to state courts. *See* FSIA §§ 2, 3, 1976 U.S.C.C.A.N. (90 Stat.) at 2891 (codified at 28 U.S.C. §§ 1330,

1332). Hence, it could be argued that application of the jurisdictional provisions simply eliminates federal courts as possible forum choices for plaintiffs, but does not affect plaintiffs' ability to pursue their claims in state courts. There, in turn, plaintiffs could oppose the railroad's immunity defense under the FSIA on retroactivity grounds. Such an interpretation of the Act would expose the railroad to a possibility of being sued in state court, even though the same lawsuit could not be brought in federal court. SNCF appears to adopt this position, urging us to separate the analysis of the Act's applicability into two distinct inquiries: jurisdiction and immunity.

A foreign sovereign's exposure to suit in state courts may not be broader than its exposure to federal courts' jurisdiction under § 1330. To rule otherwise would be inconsistent with Congress' preference that actions involving foreign states be tried in federal courts. Such preference stems, of course, from the sensitivity of actions in American courts against foreign states and the importance of having a uniform, consistent law in this area. House Report at 32, *reprinted in* 1976 U.S.C.C.A.N. at 6631. The preference is most evident in the FSIA's liberal removal provision that allows a foreign state defendant—even over objections of co-defendants—to remove to federal court any civil action brought against it in state court. *See* FSIA § 6, 1976 U.S.C.C.A.N. (90 Stat.) at 2898 (codified at 28 U.S.C. § 1441(d)).

Moreover, an interpretation of the Act that allows for a state court action against a foreign government but excludes the same action from district courts' original jurisdiction under § 1330 leads to an obviously anomalous result. Because a foreign sovereign defendant may always remove a case to federal court, *see* § 1441(d), the action would then be removable to federal court by defendant even though it could not have been originally brought in that court by plaintiff. *See* 28 U.S.C. § 1441(a) (providing generally for removal of actions within federal district courts' original

jurisdiction). Accordingly, applying the Act to bar plaintiffs' claims from federal courts does not simply eliminate one of plaintiffs' forum choices, but fully precludes the claims' adjudication in the United States. *Cf. Verlinden*, 461 U.S. at 489 (noting in dictum that "any claim permitted under the [FSIA] may be brought from the outset in federal court" under § 1330(a)).

The final question is whether plaintiffs could have legitimately expected to have their claims adjudicated in the United States prior to the FSIA's enactment. Plaintiffs aver that before the FSIA expanded the definition of a foreign state to encompass state-owned corporations, courts treated such corporations as legal entities separate from their owners and did not recognize the corporations' claims of sovereign immunity. Some pre-FSIA case law from this Circuit supports plaintiffs' assertion. For example, in *United States v. Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199 (S.D.N.Y. 1929), it was held that a French government-owned mining corporation was not entitled to immunity because the corporation was an entity distinct from its stockholders. *Id.* at 202-03. Similarly, in *Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter*, 32 F.2d 195 (2d Cir. 1929), we refused to recognize a Swedish railway company's claim of immunity because in its pleadings the company characterized itself as a corporation. *Id.* at 199-200. In rejecting the immunity claim, we reasoned that such a claim must be raised by an accredited representative of the foreign government. *Id.*

SNCF correctly points out that in other cases courts have treated national railroad companies as state instrumentalities. *See Oliver Am. Trading Co. v. Gov't of the United States of Mex.*, 5 F.2d 659 (2d Cir. 1924). For instance, in *Oliver*, we recognized the immunity claim of the National Railways of Mexico, on the ground that "the National Railways of Mexico" was simply the name given a system of railroads in the possession of the Mexican government, controlled and operated by Mexico for ten years for national

purposes similar to its running the Post Office, Customs Service, or any other branch of the national government. *Id. at 661; see also* William C. Hoffman, *The Separate Entity Rule in International Perspective: Should State Ownership of Corporate Shares Confer Sovereign Status for Immunity Purposes?*, 65 Tul. L.Rev. 535, 545-47 (1991) (observing application of separate entity rule to state-owned corporations before FSIA not uniform).

Both sides overlook one crucial aspect of the pre-FSIA law and practice in the United States – the State Department's role in courts' foreign sovereign immunity determinations. As earlier noted, the State Department often intervened in litigation by filing a suggestion of immunity. Further, even in cases where the State Department did not intervene, courts looked to that agency for guidance and generally acted in accordance with its policies.

The relevance of the State Department's policies to our retroactivity analysis is twofold. First, it appears that the State Department sometimes recognized immunity claims of corporations owned by foreign governments. In *Miller v. Ferrocarrill Del Pacifico De Nicaragua*, 18 A.2d 688 (Me. 1941), the State Department recognized a Maine corporation that operated railways within Nicaragua as an instrumentality of the Nicaraguan government, and the court, in turn, granted the company immunity. *Id.* at 690-91.

Second, and more importantly, the State Department's treatment of ordinary litigation with friendly foreign states in times of peace does not necessarily indicate the position the Department would have taken on claims closely related to war-time crimes of an enemy, such as plaintiffs' claims here. Thus, in *Altmann v. Republic of Austria*, 317 F.3d 954 (9th Cir. 2002), the Ninth Circuit held that Austria could not have legitimately expected immunity from suit "for its alleged complicity in the pillaging and retention of treasured paintings from the home of a Jewish alien who was forced to flee for his life" during the Holocaust.

Id. at 964. In reaching this result, the court relied on a 1949 State Department press release, which announced the Department's policy to "relieve American courts from any restraint upon the exercise of their jurisdiction" with respect to claims for the restitution of identifiable property wrongfully taken as a result of the Nazi persecution in Germany. *Id.* at 965-66.

The record contains no information with respect to the State Department's position during World War II on the significance of the corporate form in foreign sovereign immunity determinations. Nor is there any indication in the record whether the State Department would have recognized immunity in a case such as the one before us. As a consequence, without this information we cannot determine whether plaintiffs legitimately could have expected to litigate their claims in the United States.

CONCLUSION

Accordingly, for the reasons stated, we vacate the dismissal of the complaint and remand the case to the district court for further proceedings consistent with this opinion.

APPENDIX B – MEMORANDUM DATED NOVEMBER 5, 2001 AND ORDER DATED NOVEMBER 13, 2001 OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

RAYMONDE ABRAMS, et al.,

Plaintiffs,

- against -

SOCIÉTÉ NATIONALE DES CHEMINS DE FER FRANÇAIS,

Defendant.

MEMORANDUM AND ORDER

TRAGER, District Judge:

Plaintiffs, Holocaust survivors filing suit on behalf of themselves and on behalf of other Holocaust victims similarly situated, bring this action against the French national railroad company, the Société Nationale Des Chemins De Fer Français ("SNCF"), claiming violations of customary international law and the law of nations arising out of alleged deportation of Jews and others from their homes in France to various Nazi death camps during World War II. Defendants now move to dismiss this action because of a lack of subject matter jurisdiction due to SNCF's entitlement to sovereign immunity. Plaintiffs have cross-moved for discovery on issues relevant to the sovereign immunity determination in the event that the court finds there to be factual issues that need to be resolved prior to ruling on SNCF's motion.

Appendix B

Background

Created in August 1937 by the unification of the five major regional rail networks of France and reorganized as a corporation by a decree issued on December 11, 1940, *see* Decl. of Corinne Hershkovitch ¶¶ 2-3, with its principal place of business in Paris, France, SNCF is currently an "établissement public industriel et commercial" formed by law no. 82-1153, promulgated by the French government on February 18, 1983. *See* Decl. of Stephan Haimo Supp. Mot. Dis. [hereinafter "Haimo Decl."] ¶ 2; Decl. of Frank Terrier Supp. Mot. Dis. [hereinafter "Terrier Decl."] ¶ 2. An "établissement public" is an instrumentality of the state which has separate legal existence and is charged with performing a public service. *See* Haimo Decl. ¶ 2. It has no shares and no shareholders, is wholly owned by the state of France, and is not run for profit. *See id.* ¶ 3; Terrier Decl. ¶¶ 4, 9. Rather, its President and members of the governing board are appointed by the French government. *See* Haimo Decl. ¶ 3. Other members of the governing board are consumers and employees of SNCF. *See id.*

The public service that SNCF performs is operating a monopoly over rail transport in France. *See* Haimo Decl. ¶ 3. It owns and operates France's national railway system, with its passenger and freight trains running chiefly in France and other European countries. *See* Terrier Decl. ¶ 3. Pursuant to French law, the state supervises SNCF's administration of its services and financial matters and exercises *426 ultimate control over its operations. *See id.* ¶ 6.

Discussion

(1)

The positions of the parties can be summarized fairly succinctly. SNCF argues that this court lacks subject matter jurisdiction over plaintiffs' claims under the Foreign

Sovereign Immunities Act ("FSIA"). Alternately, if the FSIA does not apply, SNCF would have been immune from suit under sovereign immunity law as it existed prior to the effective date of the FSIA. Plaintiffs counter that the FSIA does not apply to conduct occurring prior to 1952 and that under pre-1952 law, SNCF would not have been immune from suit.

To establish a bit of necessary background, a brief history of the purposes behind the enactment of the FSIA is in order. Before 1952, foreign sovereigns were entitled to assert absolute immunity from suit in United States courts. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486, 103 S. Ct. 1962, 1967 (1983). "But in the so-called Tate Letter, the State Department announced its adoption of the 'restrictive' theory of foreign sovereign immunity. Under this theory, immunity is confined to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts." *Id.* at 487, 103 S. Ct. at 1968.

> The restrictive theory was not initially enacted into law, however, and its application proved troublesome. As in the past, initial responsibility for deciding questions of sovereign immunity fell primarily upon the Executive acting through the State Department, and the courts abided by "suggestions of immunity" from the State Department. As a consequence, foreign nations often placed diplomatic pressure on the State Department in seeking immunity. On occasion, political considerations led to suggestions of immunity in cases where immunity would not have been available under the restrictive theory.

Id.

"In 1976, Congress passed the Foreign Sovereign Immunities Act in order to free the Government from the

case-by-case diplomatic pressures, to clarify the governing standards, and to 'assur[e] litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process.' " *Id.* at 488, 103 S. Ct. at 1968 (citation omitted).

> For the most part, the Act codifies, as a matter of federal law, the restrictive theory of sovereign immunity. A foreign state is normally immune from the jurisdiction of federal and state courts, 28 U.S.C. § 1604, subject to a set of exceptions specified in §§ 1605 and 1607. Those exceptions include actions in which the foreign state has explicitly or impliedly waived its immunity, § 1605(a)(1), and actions based upon commercial activities of the foreign sovereign carried on in the United States or causing a direct effect in the United States, § 1605(a)(2). When one of these or the other specified exceptions applies, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. § 1606.

Id. at 488-489, 103 S. Ct. at 1968-69.

Wright, Miller and Cooper, in their multi-volume "Federal Practice and Procedure" treatise, expand upon these themes:

> The Foreign Sovereign Immunities Act (FSIA) of 1976 was designed to provide a set of comprehensive regulations governing access to the federal and state courts in this country for plaintiffs asserting claims against foreign states and instrumentalities thereof. The enactment of this legislation responded to the reality that increased contacts between American citizens and companies on the one hand, and foreign states and entities owned by foreign states on the

other, as well as a constantly expanding range of governmental activities, had created the need for judicial fora in this country to resolve disputes arising out of these activities. In addition, the Act addressed the uncertainties of the then current American judicial practices and Department of State policies with regard to a foreign nation's sovereign immunity.

According to the House Report, the statute was designed to accomplish four objectives. First, the Immunities Act codified the so-called "restrictive" principle of sovereign immunity, as recognized in international law. Under this doctrine, the immunity of a foreign state in the courts of the United States is "restricted" to claims involving the foreign state's public acts and does not extend to suits based on its commercial or private conduct. This principle was adopted by the Department of State in 1952 and has been followed by American courts in numerous cases and by the executive branch of the national government ever since. Moreover, the principle is regularly applied in suits against the United States in foreign courts.

Second, the 1976 statute tried to insure that this restrictive principle of sovereign immunity is applied uniformly in litigation before United States courts. Prior to the Act, when a foreign state wished to assert immunity, it often requested the Department of State to make a formal suggestion of immunity to the court. Although the State Department espoused the restrictive principle of immunity, the foreign state might have attempted to bring diplomatic influences to bear upon the Department's sovereign-immunity determination. A principal purpose of the Immunities Act was to transfer

the immunity determination from the executive branch to the judicial branch of the national government, thereby reducing the issue's foreign policy implications and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process and uniformity of application. In this regard, the statute brought American immunity practice into conformity with the practice of almost every other country in the world.

Third, the Foreign Sovereign Immunities Act provides a formal procedure for making service of process upon, giving notice to, and obtaining in personam jurisdiction over a foreign state or one of its instrumentalities in an action in a United States court. The existence of this procedure renders unnecessary the former practice of seizing and attaching the property of a foreign government for the purpose of obtaining personal jurisdiction over it in the United States.

Fourth, the statute purports to remedy, at least in part, the predicament of a plaintiff who has obtained a judgment against a foreign state. Under prior law, a foreign state enjoyed absolute immunity from execution, even in ordinary commercial litigation in which commercial assets were available in this country for satisfying this broad immunity. It conformed the execution-immunity rules more closely to the jurisdiction-immunity rules and provides the judgment creditor some remedy if, after a reasonable period, a foreign state or its enterprise fails to satisfy a judgment rendered against it.

Wright, Miller & Cooper, 14A Federal Practice and Procedure: Jurisdiction 3d § 3662 (footnotes omitted).

Appendix B

The FSIA itself consists of both jurisdictional and sovereign-immunity provisions, which work in tandem. For the purposes of this case, the relevant jurisdictional language appears in 28 U.S.C. § 1330(a), which provides that:

> The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

28 U.S.C. § 1330(a) (1976).

It is then necessary to ask what constitutes a foreign state under the sovereign immunity provisions. Section 1603(a) and § 1603(b) specifically address the issue:

> (a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity –
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

28 U.S.C. §§ 1603(a), (b) (1976).

Section § 1604, entitled "Immunity of a foreign state from jurisdiction," in turn, provides that:

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1604 (1976). § 1605 then proceeds to itemize various exceptions to sovereign immunity of foreign states. There will be occasion to focus on these exceptions shortly.

(2)

The first question that must be addressed is whether the FSIA permits this court to exercise subject matter jurisdiction over plaintiffs' claims against SNCF. SNCF argues that plaintiffs have conceded that the FSIA does not permit jurisdiction over their claims:

> The parties agree that 28 U.S.C. § 1330 does not provide subject matter jurisdiction over this action. Although section 1330 grants subject matter jurisdiction to federal district courts over certain actions against "foreign states," plaintiffs' Complaint and opposition brief make plain that the plaintiffs are not here alleging the existence of subject matter jurisdiction under section 1330.

> Plaintiffs concede this point because they must; this action does not fall within any of the exceptions to immunity specified in 28 U.S.C. §§ 1605-07, and section 1330 therefore does not confer subject matter jurisdiction over this action.

Def.'s Repl. at 4. Plaintiffs, however, insist that they have not conceded anything of the sort: "Plaintiffs do not 'concede' subject matter jurisdiction under § 1330 as SNCF alleges. Plaintiffs' position is that § 1330 does not apply because the FSIA, of which it is a part, is not retroactive." Pls.' Sur-Repl. at 2, n. 6. Since plaintiffs have insisted that their failure to address the issue of whether or not this court has subject matter jurisdiction under the enumerated exceptions to the sovereign immunity provisions of the FSIA does not represent a concession, it will not be treated as such.[1]

As a threshold matter, SNCF, wholly owned by the French government as it is, fits foursquare into the definition of an "agency or instrumentality of a foreign state" as defined in § 1603(b). SNCF is a "separate legal person, corporate or otherwise," 28 U.S.C. § 1603(b)(1), "which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof," 28 U.S.C. § 1603(b)(2), and "which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country." 28 U.S.C. § 1603(b)(3). Plaintiffs do not contest this conclusion, and it is supported by relevant caselaw. *See NYSA-ILA Pension Trust Fund v. Garuda Indonesia*, 7 F.3d 35, 38 (2d Cir. 1993) (corporation owned by foreign state); *Moses v. Air Afrique*, No. 99-CV-541, 2000 WL 306853, at *2 (E.D.N.Y. March 21, 2000) (airline owned by West African nations); *Seramur v. Saudi Arabian Airlines*, 934 F. Supp. 48, 51 (E.D.N.Y. 1996) (airline corporation wholly-owned by Saudi Arabia).

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1. It should be noted that even in their complaint, plaintiffs did not plead § 1330 as a basis for subject matter jurisdiction.

"Once the defendant presents a prima facie case that it is a foreign sovereign, the plaintiff has the burden of going forward with evidence showing that, under exceptions to the FSIA, immunity should not be granted, although the ultimate burden of persuasion remains with the alleged foreign sovereign." *Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1016 (2d Cir. 1993); *Cabiri v. Government of the Republic of Ghana*, 165 F.3d 193, 196 (2d Cir. 1999). Here, plaintiffs have clearly not shouldered this burden, since they have not taken the position that the FSIA is applicable to this case.

Nevertheless, it is worth pausing to confirm that none of the exceptions to the FSIA can be invoked here. Only four of the enumerated exceptions are possibly relevant, so only those four will be addressed here.

First, there is the exception for commercial activities, which allows a plaintiff to maintain a suit where

> the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2). In this case, there is clearly no commercial activity by a foreign state carried on in the United States, and there is no act performed in the United States in connection with a commercial activity by a foreign state. The only question is whether there is an act outside the territory of the United States in connection with a commercial activity of a foreign state that causes a direct effect in the United States.

Appendix B

Despite the horrendous consequences to the plaintiffs, some of whom were American citizens, of SNCF's alleged conduct, the law to date would not consider such effects as within the parameters of the commercial activity exception. "Indirect injurious consequences within this country of an out-of-state act are not sufficient contacts to satisfy the 'direct effect' requirement of section 1605(a)(2)." *Harris v. VAO InTourist, Moscow*, 481 F. Supp. 1056, 1062 (E.D.N.Y. 1979) ("Obviously the negligent operation of a hotel in Moscow causing the death of a United States resident has effects in the United States; here it leaves aggrieved relatives in this country. But the precise issue is not whether the fire had any effect here, but whether it had a 'direct effect' in the United States within the meaning of the statutory language"); *see also Princz v. Fed'l Republic of Germany*, 26 F.3d 1166, 1172-73 (D.C. Cir. 1994) ("Mr. Princz argues that his continued suffering in the United States is a direct effect of his forced labor under the Nazi yoke. After Mr. Princz was liberated by the United States Army he spent time recuperating in a military hospital. From there he went to Czechoslovakia to search for relatives and to attend to his family's property, only after which did he move to the United States. Mr. Princz's subsequent suffering was clearly an effect, but just as clearly not 'a direct effect in the United States' of the Nazis' actions. . . . The lingering effects of a personal injury suffered overseas can not be sufficient to satisfy the direct effect requirement of the FSIA. Otherwise, 'the commercial activity exception would in large part eviscerate the FSIA's provision of immunity for foreign states.'"); *Antares Aircraft, L.P. v. Federal Republic of Nigeria*, 999 F.2d 33, 36 (2d Cir. 1993) ("the fact that an American individual or firm suffers some financial loss from a foreign tort cannot, standing alone, suffice to trigger the exception"); *Casalino v. Ente Ferrovie dello Stato*, 779 F. Supp. 338, 341 (S.D.N.Y. 1991) ("This action is not based upon any commercial activity carried on by Ente Ferrovie in the United States. Mrs. Casalino purchased her rail ticket in Milan for transportation on a train operated by defendant Ente Ferrovie within the borders of Italy. Her alleged injuries

were sustained while a passenger on that domestic journey in Italy. The fact that plaintiff could have purchased her ticket from an alleged agent of defendant in New York does not establish any particular tie between Ente Ferrovie's activities in the United States and the alleged injuries sustained by plaintiff in Italy"); *Lasagne v. Divi Hotels*, 685 F. Supp. 88, 90 (S.D.N.Y. 1988) ("suffering pain in the United States as a result of injury elsewhere is not a sufficiently 'direct effect' within the meaning of § 1605(a)(2)"). Accordingly, even if SNCF's activities implicated in this case can be considered commercial in nature, which SNCF contends they cannot be, *see* Def.'s Mem. at 7, n. 4., there is certainly no direct effect on commerce in the United States. The commercial activity exception, therefore, does not apply.

Next, there is an exception for noncommercial torts supplied in 28 U.S.C. § 1605(a)(5). This exception applies to claims

> not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment.

28 U.S.C. § 1605(a)(5). This section is inapplicable to the case at bar, since there is a requirement that the tort occur in the United States. Courts have interpreted this section to mean that the tort must have taken place entirely within the United States. *See, e.g., Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 441, 109 S.Ct. 683, 692 (1989); *Fickling v. Commonwealth of Australia*, 775 F. Supp. 66, 72. In this case, no part of the tort is alleged to have occurred in the United States.

The third exception that could possibly have any relevance, albeit marginal, to this case is the waiver of immunity exception embodied in 28 U.S.C. § 1605(a)(1), which removes immunity in cases

> in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver.

28 U.S.C. § 1605(a)(1). Plaintiffs adduce several cases from before 1952 where SNCF did not appear to raise a sovereign immunity defense to show that SNCF did not consider itself immune from suit under pre-FSIA law. *See* Pls.' Mem. at 30; Pls.' Repl. at 8. Although plaintiffs do not appear to be arguing that these cases somehow imply that SNCF has currently waived its immunity defense, it should be noted that such an argument, if made, would fail:

> An examination of the legislative history of the FSIA reveals three examples of implied waiver: (1) when a foreign sovereign agrees to arbitrate in another country; (2) when a foreign sovereign agrees that the law of another country governs a particular contract; and (3) when a foreign sovereign fails to raise the defense of sovereign immunity in its responsive pleadings. H.R. Rep. No. 1487, 94th Cong., 2d Sess., reprinted in 1976 U.S. Code Cong. & Ad. News 6604, 6617.

Fickling, 775 F. Supp. at 70; *see also Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1017 (2d Cir. 1991). The facts of this case implicate none of these three categories.

However, in *Princz v. Fed'l Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994), a case that will be discussed at length below, Judge Wald, in dissent, suggested that the waiver exception should be applied to claims against Germany by

a Holocaust survivor under the theory that all nations are understood to have consented to suits for violations of so-called *jus cogens* norms. *See id.* at 1179 (Wald, J., dissenting). A *jus cogens* norm is "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law of the same character." *Id.* at 1179-80. After setting about the task of demonstrating that the conduct of the Nazis during the Second World War did indeed violate accepted *jus cogens* norms, Judge Wald concluded that

> [i]n the absence of any indication that Congress intended to exclude from the scope of § 1605(a)(1) the concept that a foreign state waives its immunity by breaching a peremptory norm of international law, I believe that the only way to interpret the FSIA in accordance with international law is to construe the Act to encompass an implied waiver exception for *jus cogens* violations. Congress did not intend to thwart the opportunity of an American victim of the Holocaust to have his claims heard by the United States judicial system.

Id. at 1184-85.

Appealing as Judge Wald's view may be, it was rejected by the *Princz* majority. The majority, then-Judge Ginsburg writing for the court, found that the "*jus cogens* theory of implied waiver is incompatible with the intentionality requirement implicit in § 1605(a)(1). [Citing numerous cases in support of this proposition.] That requirement is also reflected in the examples of implied waiver set forth in the legislative history of § 1605(a)(1), all of which arise either from the foreign state's agreement (to arbitration or to a particular choice of law) or from its filing a responsible pleading without raising the defense of sovereign immunity." *Id.* at 1174. "[S]ince the FSIA became law, courts

have been reluctant to stray beyond these examples when considering claims that a nation has implicitly waived its defense of sovereign immunity," then-Judge Ginsburg continued. *Id.*

> In sum, an implied waiver depends upon the foreign government's having at some point indicated its amenability to suit. Mr. Princz does not maintain, however, that either the present government of Germany or the predecessor government of the Third Reich actually indicated, even implicitly, a willingness to waive immunity for actions arising out of Nazi atrocities. We have no warrant, therefore, for holding that violation of *jus cogens* norms by the Third Reich constitutes an implied waiver of sovereign immunity under the FSIA.

Id.

Judge Ginsburg went on specifically to reject Judge Wald's arguments:

> Judge Wald finds that grant [of jurisdiction] through a creative, not to say strained, reading of the FSIA against the background of international law itself. We think that something more nearly express is wanted before we impute to the Congress an intention that the federal courts assume jurisdiction over the countless human rights cases that might well be brought by the victims of all the ruthless military juntas, presidents-for-life, and murderous dictators of the world, from Idi Amin to Mao Zedong. Such an expansive reading of § 1605(a)(1) would likely place an enormous strain not only upon our courts but, more to the immediate point, upon our country's diplomatic relations with any number of foreign nations. In many if not most

> cases the outlaw regime would no longer even be in power and our Government could have normal relations with the government of the day – unless disrupted by our courts, that is. Like Judge Wald, we recognize that this suit may represent Mr. Princz's last hope of reparation. Still, we cannot responsibly make the inferential leap that would be required in order to provide him with the federal forum he seeks.

Id. at n. 1.

More recently, the Seventh Circuit in *Sampson v. Fed'l Republic of Germany*, 250 F.3d 1145 (7th Cir. 2001), a case that will also be discussed at length below, rejected the same *jus cogens* argument in a situation with similar facts, involving a suit for slave labor exacted by the Nazis during World War II. The Circuit referred to the *jus cogens* argument as encouraging "an evolving understanding of waiver, an understanding which is necessarily subject to the vagaries of customary international law. Customary international law can evolve unpredictably without reference to the understandings of courts or Congress." *Id.* at 1154. Incorporating *jus cogens* norms into the waiver exception, the court held, "would entail a truly novel and possibly unrestrained form of jurisdiction. . . . Congress could not have intended to confer a jurisdiction so malleable on Article III courts without a clear statement to that effect." *Id.* at 1154-55.

Although there is clear authority[2] as well as policy considerations – including its possible abuse by foreign courts against officials of America and its allies-that militate against the adoption of Judge Wald's *jus cogens* waiver theory, there is no need to decide the issue here definitively. Plaintiffs have not sought jurisdiction pursuant to the

2. The Ninth Circuit has also held that *jus cogens* norms could not be used to secure jurisdiction over a sovereign nation. *See Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992).

waiver exception and have not argued that such jurisdiction exists.

Finally, in § 1605(a)(7), the FSIA provides an exception for actions seeking:

> money damages . . . against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph—
>
> > (A) if the foreign state was not designated as a state sponsor of terrorism under 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act. . . .

28 U.S.C. § 1605(a)(7). The text of the exception makes clear why it does not apply. Even if the acts here in question could be classified as provision of material support for an act of extrajudicial killing by an official, employee or agent of a foreign state acting within the scope of his or her office, employment or agency, there would still remain the fact that the nation of France has not been designated as a state sponsor of terrorism under either the Export Administration Act of 1979 or under the Foreign Assistance Act of 1961.

Thus, it would appear that none of the exceptions to the FSIA apply to this case. SNCF is a foreign state entitled to immunity under the FSIA, and this court has no jurisdiction over plaintiffs' claims under § 1330 if that provision indeed governs the case at bar.

(3)

The principal question in this case, then, is whether the FSIA applies to the conduct alleged to have taken place during World War II, prior to 1976, the year the FSIA was enacted and prior to 1952, the year of the Tate Letter which adopted the restrictive theory of sovereign immunity. Plaintiffs argue that the FSIA does not apply to this action. In fact, as noted above, their complaint does not even seek to make out a basis for jurisdiction under the FSIA. Rather, they seek to invoke the jurisdiction of this court pursuant to 28 U.S.C. § 1331 "because all Plaintiffs' claims involve substantial international law and federal questions, and because all Plaintiffs' claims arise under customary international law enforceable in this Court as federal common law," Pls.' Compl. ¶ 37, and the Alien Tort Claims Act, 28 U.S.C. § 1350. *See* Pls.' Compl. ¶ 38.

Plaintiffs' argument against the applicability of the FSIA is premised almost entirely on a 1988 Second Circuit case, *Carl Marks & Co. v. Union of Soviet Socialist Republics*, 841 F.2d 26 (2d Cir. 1988), where plaintiffs, class representatives of holders of debt instruments issued by the Russian Imperial Government in 1916, brought suit against the Soviet Union to recover on those instruments. The Second Circuit held that the FSIA was not retroactive to before 1952:

> We agree with the district court that although the issuance of public debt falls within the "commercial activity" exception of § 1605(a)(2) of the FSIA, *see* 665 F. Supp. at 335-36, the federal courts have no jurisdiction over these suits. The district court found that the Act is inapplicable to claims arising before the State Department issued the "Tate Letter" in 1952, adopting the "restrictive theory" of sovereign immunity that excluded nonpublic and commercial activities, *see id.* at 335. Such a retroactive application of the FSIA would affect adversely the USSR's

> settled expectation, rising "to the level of an antecedent right," of immunity from suit in American courts. *Id.* at 338-39. We believe, as did the district court, that "[o]nly after 1952 was it reasonable for a foreign sovereign to anticipate being sued in the United States courts on commercial transactions," 665 F. Supp. at 339. However, we need not decide the effect of the FSIA on causes of action arising between 1952 and the enactment of the Act.

Id. at 27 (some citations omitted). The Eleventh Circuit had reached the same conclusion in 1986. *See Jackson v. People's Republic of China*, 794 F.2d 1490, 1498-99 (11th Cir. 1986) ("We agree that to give the Act retrospective application to pre 1952 events would interfere with antecedent rights of other sovereigns (and also with antecedent principles of law that the United States followed until 1952). It would be manifestly unfair for the United States to modify the immunity afforded a foreign state in 1911 by the enactment of a statute nearly three quarters of a century later").

But there is reason to believe that *Carl Marks* does not govern the case at bar. To begin with, *Carl Marks* may no longer be good law, or may at least be limited in its application, in the wake of the Supreme Court's decision in *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483 (1994). Although *Landgraf*'s subject matter had nothing at all to do with the FSIA, involving, as it did, the retroactivity of provisions of the Civil Rights Act of 1991, the *Landgraf* court had some very relevant things to say about retroactivity:

> We have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the suit was filed. Thus, in *Bruner v. United States*, 343 U.S. 112, 116-117, 72 S. Ct. 581, 584-585 (1952), relying on our "consisten[t]" practice, we ordered an

> action dismissed because the jurisdictional statute under which it had been (properly) filed was subsequently repealed. Conversely, in *Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604, 607-608, n. 6, 98 S. Ct. 2002, 2005, n. 6 (1978), we held that, because a statute passed while the case was pending on appeal had eliminated the amount-in-controversy requirement for federal-question cases, the fact that respondent had failed to allege $10,000 in controversy at the commencement of the action was "now of no moment." Application of a new jurisdictional rule usually "takes away no substantive right but simply changes that tribunal that is to hear the case." Present law normally governs in such situations because jurisdictional statutes "speak to the power of the court rather than to the rights or obligations of the parties."

Id. at 274, 114 S.Ct. at 1501-02 (some citations omitted).

Justice Scalia, in his concurrence, joined by Justices Kennedy and Thomas, expanded upon the majority's discussion of jurisdictional statutes in a manner particularly relevant to the case at bar:

> The Court explains this aspect of our retroactivity jurisprudence by noting that "a new jurisdictional rule" will often not involve retroactivity in Justice Story's sense because it "'takes away no substantive right but simply changes the tribunal that is to hear the case.'" That may be true sometimes, but surely not always. A jurisdictional rule can deny a litigant a forum for his claim entirely, *see* Portal-to-Portal Act of 1947, 61 Stat. 84, as amended, 29 U.S.C. §§ 251-262, or may leave him with an alternate forum that will deny relief for some collateral reason (e.g., a statute of limitations bar). Our

> jurisdictional cases are explained, I think, by the fact that the purpose of provisions conferring or eliminating jurisdiction is to permit or forbid the exercise of judicial power-so that the relevant event for retroactivity purposes is the moment at which that power is sought to be exercised.

Id. at 292-293, 114 S. Ct. at 1526 (Scalia, J., concurring) (some citations omitted).

Both the majority and Justice Scalia's concurrence suggest, then, that as soon as jurisdictional statutes are enacted, they are applied to any case that is filed, regardless of whether the actual events alleged to have taken place pre-date the passage of the relevant jurisdictional statute. At times, of course, as Justice Scalia points out, the application of these jurisdictional statutes will unsuit a party who would have expected to have had access to the courts under the jurisdictional regime in force during the time when the litigable events occurred, or, more frequently, will relegate the dispute among the parties to a forum that is, in one way or another, undesirable or prejudicial to the rights of one or more of the litigants. This is inevitable due to the lack of a clear boundary between substance and procedure.

Indeed, courts addressing the FSIA's retroactivity in a post-*Landgraf* environment have relied upon *Landgraf* to indicate or arrive at results contrary to that reached by the Second Circuit in *Carl Marks*. In *Haven v. Rzeczpospolita Polska (Republic of Poland)*, 68 F. Supp.2d 943 (N.D. Ill. 1999), for example, owners of property in Poland brought suit against the Polish government for wrongful seizure and expropriation of real property during and shortly after the Second World War. The court began with the standard dichotomy, that "[b]efore 1952 foreign sovereigns were entitled to assert absolute immunity from suit in United States courts," *id.* at 944, while after 1952, the Tate Letter "restricted that immunity to suits involving the public acts of a foreign sovereign, while eliminating such immunity

for commercial acts." *id.* The change in the law was outcome-determinative in the case, in the sense that applying post 1952 sovereign immunity law would have permitted jurisdiction over these claims. The district court wrote:

> Three Courts of Appeals have weighed in on [whether Congress conferred jurisdiction over claims arising before 1952 in enacting the FSIA]: first, *Jackson*, then *Carl Marks & Co., Inc. v. USSR*, 841 F.2d 26, 27 (2d Cir. 1988) (per curiam) and, less than two months ago, *Creighton Ltd. v. Government of the State of Qatar*, 181 F.3d 118 (D.C. Cir. 1999). That has produced a 2 to 1 split in favor of a negative answer to the question, although only the most recent (and minority) decision has had the benefit of the Supreme Court's definite teaching on the subject of retroactivity in *Landgraf*.

Id. at 945 (some citations omitted). The court then proceeded to distinguish *Carl Marks* and *Jackson*, arguing that the basis for those two decisions was not a jurisdictional one in the *Landgraf* sense, "that is, whether the Act applies to conduct that predated its grant of subject matter jurisdiction," *id.* at 946, but rather "how far back the conduct susceptible to relief should go once such jurisdiction has been conferred." *Id.* The court then concluded that although the question was close, "this Court finds the District of Columbia view—articulated as it has been in two post-*Langraf* decisions (*Princz*, 26 F.3d at 1170-71 and *Creighton*), and having commanded the adherence of five judges of that court-to be more persuasive." *Id.*

Even more recently, in *Altmann v. Republic of Austria*, 142 F. Supp.2d 1187 (C.D. Cal. 2001), the Central District of California, addressing a lawsuit against the Republic of Austria seeking return of Klimt paintings allegedly stolen by the Nazis in the early 1940s in Austria and currently in the possession of the Austrian Gallery, reached the same

conclusion, viz., that there was jurisdiction over pre-1952 claims under the FSIA. Again, plaintiffs sought to apply the FSIA retroactively, while the defendants claimed that pre-1952 law was controlling. "Although the Defendants' position on the FSIA's applicability to pre-1952 events is supported by case law," the district court wrote, "the continued viability of these cases is in doubt in light of the United States Supreme Court's subsequent decision in *Landgraf*. *Landgraf*, as well as cases decided after *Landgraf* regarding the FSIA's application to pre-1952 events, lead the Court to conclude that the FSIA applies to pre-1952 events." *Id.* at 1199. The court continued: "[T]he Supreme Court rejected the rationale that was employed by the *Jackson*, *Carl Marks*, and *Slade* courts in situations involving the question of retroactivity of jurisdictional statutes. In these situations, the Supreme Court favors applying the law in effect at the time of the decision." *Id.* at 1200. Noting that "[t]he FSIA does not affect any substantive law determining the liability of a foreign state or instrumentality," *id.* (citing *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 620, 103 S. Ct. 2591, 77 L. Ed. 2d 46 (1983); H.R.Rep. No. 94-1487 (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News at 6610 ("The bill is not intended to affect the substantive law of liability.")), the court concluded that the FSIA's provisions must be applied to events predating 1952.

Most expansive on the issue, however, was the D.C. Circuit's decision in *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (1994), decided only a few months after the Supreme Court's holding in *Landgraf*. In *Princz*, a Holocaust survivor who was an American citizen at the time of the lawsuit but not at the time when the underlying conduct occurred sued the Federal Republic of Germany for injuries suffered and slave labor performed while a prisoner in Nazi death camps. Plaintiff sought to steer the court towards the FSIA and its commercial activity and waiver exceptions and away from the law before 1952, when "the United States, as a matter of grace and comity, granted foreign sovereigns

'virtually absolute immunity' from suit in the courts of this country." *Id.* at 105 (citation omitted). The D.C. Circuit wrote:

> There is a strong argument in favor of applying the FSIA retroactively, however. In declaring the purpose of the FSIA, the Congress directed that "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter." 28 U.S.C. § 1602. This suggests that the FSIA is to be applied to all cases decided after its enactment, i.e. regardless of when the plaintiff's cause of action may have accrued. *But see Jackson,* 596 F. Supp. at 388. Moreover, when it enacted the FSIA, the Congress deleted from 28 U.S.C. § 1332 the provision for diversity jurisdiction over suits brought by a United States citizen against a foreign government. According to the House Report on the FSIA, "since jurisdiction in actions against foreign states is comprehensively treated by the new section 1330, a similar jurisdictional basis under section 1332 becomes superfluous." H.R. Rep. No. 9401487, 94th Cong.2d Sess., 14 (1976). Unless one is to infer that the Congress intentionally but silently denied a federal forum for all suits against a foreign sovereign arising under federal law that were filed after enactment of the FSIA but based upon pre-FSIA facts, the implication is strong that all questions of foreign sovereign immunity, including those that involve an act of a foreign government taken before 1976, are to be decided under the FSIA. *See Yessenin-Volpin,* 443 F. Supp. 849, 851 n. 1.

> Indeed, under the teaching of a recent Supreme Court case, application of the FSIA to the pre-1952 events here in suit may not even count as "a genuinely 'retroactive' effect" [citing *Landgraf*]. . . . [I]t might be argued, application of the FSIA (and particularly application of an exception set out in the FSIA) to the events at issue in this case would not alter Germany's liability under the applicable substantive law in force at the time, i.e. it would just remove the bar of sovereign immunity to the plaintiff's vindicating his rights under that law.

Id. at 1169-70.

Ultimately, however, although swayed in the direction of applying the FSIA to pre-1952 events, the D.C. Circuit did not feel it necessary to rule definitively on the issue for reasons that will be considered in full a bit later. [3] The point, for the purposes of the present discussion, is that in the wake of *Landgraf*, courts considering the retroactivity of the FSIA to pre 1952 conduct have begun to diverge from the course charted by the Second Circuit in *Carl Marks*. Plaintiffs, however, attempt to avoid the implications of *Landgraf* by arguing that the FSIA, in contrast to other jurisdictional statutes, works a substantive change in immunity law, and is, thus, different from the purely jurisdictional statutes which the Court had in mind when it concluded that newly-enacted jurisdictional statutes should be applied to all cases filed after their enactment, regardless of the date of the underlying conduct alleged. *See* Pls.' Mem. Law Opp. Def.'s Mot. Dis. and Supp. Cross Mot. [hereinafter "Pls.' Mem."] at 7-8.

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3. It should be noted that Judge Wald's dissenting opinion in *Princz*, although disagreeing with the majority's result and finding jurisdiction over Mr. Princz's claims under the implied waiver exception to the FSIA, was unequivocal about the fact that the FSIA was the *sole* means of obtaining jurisdiction *over* Princz's World War II-era claims. *See id.* at 1178 (Wald, J. dissenting).

In support of their contention, plaintiffs cite *Hughes Aircraft Co. v. U.S.*, 520 U.S. 939, 117 S. Ct. 1871 (1997), where the Court had occasion to consider the retroactivity of the *qui tam* provision of the False Claims Act, 31 U.S.C. §§ 3730(b) which permits, in certain circumstances, suits by private parties on behalf of the United States against anyone submitting a false claim to the Government. Prior to 1986, as the Court explained, such suits were barred if the information on which they were based was already in the Government's possession. However, a 1986 amendment to the False Claims Act partially removed that bar. The plaintiff in *Hughes* had brought suit under the False Claims Act based on conduct pre-dating the effective date of the amendment and argued that the amendment, which he needed to maintain his suit, should apply to his claim. In support of this point, he argued that the 1986 amendment is merely jurisdictional and, therefore, an exception to the general *Landgraf* presumption against retroactivity. *Id.* at 950, 117 S. Ct. at 1878. The Court responded:

> Statutes merely addressing *which* court shall have jurisdiction to entertain a particular cause of action can fairly be said merely to regulate the secondary conduct of litigation and not the underlying primary conduct of the parties. Such statutes affect only *where* a suit may be brought, not *whether* it may be brought at all. The 1986 amendment, however, does not merely allocate jurisdiction among forums. Rather, it *creates* jurisdiction where none previously existed; it thus speaks not just to the power of a particular court but to the substantive rights of the parties as well. Such a statute, even though phrased in "jurisdictional" terms, is as much subject to our presumption against retroactivity as any other.

Id. at 950-951, 117 S. Ct. at 1878 (emphasis in original).

Thus, the argument would go, the FSIA does not merely affect where a suit may be brought but rather, contracts the scope of sovereign immunity, thereby *creating* jurisdiction where none previously existed over commercial activities of foreign nations. Accordingly, the FSIA should not be applied to pre-1952 events.

Several considerations undermine plaintiffs' argument on this point. First, the *qui tam* provision of the False Claims Act might be distinguished from the FSIA on the grounds that both the House Report accompanying the bill and the Supreme Court have found that the FSIA was not intended to affect any substantive law of liability. *See First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 620, 103 S.Ct. 2591 (1983) (noting that "[t]he FSIA does not affect any substantive law determining the liability of a foreign state or instrumentality."); H.R. Rep. No. 94-1487 (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News at 6610 ("The bill is not intended to affect the substantive law of liability"). Although all jurisdictional statutes have substantive effects, and the FSIA is no exception, in point of fact, there is a significant and arguably outcome-determinative difference between an amendment to the False Claims Act, a substantive law, and the enactment of § 1330, a statute that is obviously jurisdictional in spirit, regardless of whether it may also have substantive consequences. Therefore, even if its immunity provisions allow certain suits against foreign governments in American courts where formerly none could be brought, the FSIA cannot be fundamentally viewed as speaking to the substantive rights of the parties but simply to the power of federal courts to hear such suits.

Second, and alternatively, one must remember that the FSIA consists of a subject matter jurisdiction provision, § 1330, and sovereign immunity provisions. The sovereign immunity provisions restrict the scope of sovereign immunity, thereby creating new rights, and consequently, should be retroactive only to the date when parties had an

expectation that immunity would be applied according to the restrictive theory, viz., 1952. However, the jurisdiction provision does not alter anything. It simply replaces § 1331 and § 1332 as the exclusive means of obtaining jurisdiction over a foreign sovereign. It is true that § 1330 makes reference to the sovereign immunity provisions in order to define the scope of federal subject matter jurisdiction, and as has been noted already, the sovereign immunity provisions, pursuant to this interpretation, should not be applied retroactively before 1952, but this is no different than saying that a party seeking to invoke the jurisdiction of a federal court pursuant to § 1331 or § 1332 could still be thrown out of court by virtue of an applicable defense, such as the statute of limitations. The fact that the statute of limitations would serve to limit the jurisdiction of a federal court over claims otherwise validly brought under § 1331 or § 1332 does not turn these jurisdictional statutes into substantive statutes. The same might be said of the relationship between § 1330 and the sovereign immunity sections of the FSIA.

Thus, in a suit premised on conduct occurring prior to 1952, the sovereign immunity law of the FSIA could not be used to create jurisdiction where none would have existed prior to that date, since this would involve retroactive application of the sovereign immunity provisions and would be directly contrary to the holding of the Second Circuit in *Carl Marks*. But conversely, § 1330 itself, a purely jurisdictional provision, would be applicable to any suit brought after the date of its enactment, even if the conduct occurred prior to 1952. Accordingly, a party filing suit today and seeking to invoke jurisdiction under § 1331 or § 1332 as he could have before the enactment of § 1330 would not be able to do so. Of course, this would mean that a plaintiff seeking federal jurisdiction over a foreign sovereign for pre-1952 events would have to use pre-1952 sovereign immunity law, which, however, could not be accessed because there would be no jurisdiction under § 1330 unless the underlying conduct also qualified under one of the exceptions to the substantive provisions of the FSIA.

Appendix B

To flesh out this understanding more clearly, as well as to supply some authority in support of what has been said thus far, it will be necessary to return to the aborted discussion of the D.C. Circuit's decision in *Princz*. As has already been mentioned, the *Princz* court, while suggesting that the FSIA should be retroactive to before 1952, stopped short of so holding because it was confronted with a situation where it did not have to make this decision. The court explained:

> We do not have to decide whether the FSIA applies to pre-1952 events, however, in order to resolve this case. . . . [E]ven if Germany is not immune from suit under the pre-FSIA law that would apply to Mr. Princz's claims, and even if Germany is not immune from suit under the pre-FSIA law that would apply, then as will be seen [below], a federal district court does not have jurisdiction over Mr. Princz's claims because they arise in tort and quasi contract. Mr. Princz offers no case law, and we are aware of none, suggesting that a court can revive the pre-FSIA diversity jurisdiction of § 1332 over cases brought by a United States citizen against a foreign state in order to entertain a case arising from pre-FSIA facts. In either event, therefore, the district court is without subject matter jurisdiction of the present case.

Princz, 26 F.3d at 107.

The court expanded upon this conclusion later in its opinion:

> What, then, if the FSIA does not apply retroactively to bar this case? In that event, Germany argues (albeit for the first time on appeal) that it is entitled to absolute sovereign immunity under the case law of this circuit as it

stood during the period 1942-45, i.e. prior to the Tate Letter and the adoption of the restrictive theory of sovereign immunity. . . .

Because subject matter jurisdiction cannot be created by consent, waiver, or even estoppel, *Insurance Corp. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982), we would consider this belated argument if it were of any consequence to federal jurisdiction of this case. It is immaterial, however, because there is no present basis for subject matter jurisdiction over Mr. Princz's claims in the district court regardless of the state of the circuit law concerning immunity in the period 1942-1945.

Until passage of the FSIA in 1976, 28 U.S.C. § 1332 provided for federal diversity jurisdiction over a case brought by a United States citizen against a foreign state. When the Congress passed the FSIA, however, it deleted that grant of jurisdiction from § 1332. As noted above, the House Report on the FSIA states that "[s]ince jurisdiction in actions against foreign states is comprehensively treated by the new section 1330, a similar jurisdictional basis under section 1332 becomes superfluous." H.R.Rep. No. 94-1487, 94th Cong.2d Sess., 14 (1976). New § 1330(a), in turn, asserts federal jurisdiction over a suit against a foreign state only insofar as the foreign state is not entitled to immunity under the FSIA; and as we have already held, no exception to immunity under the FSIA covers this case.

Nor is this case within the federal question jurisdiction conferred by 28 U.S.C. § 1331, because Mr. Princz's claims against Germany sound in tort and quasi contract, not in federal

> law. Regardless whether Germany is entitled to sovereign immunity apart from the FSIA, therefore, the district court lacks subject matter jurisdiction over Mr. Princz's claims.

Id. at 1175-76.

The D.C. Circuit in *Princz* appears to be making a distinction between the diversity jurisdiction provision, which was amended in 1976 to complement the FSIA, and federal question jurisdiction, which, it assumes, remained the same even after the passage of the FSIA. As Mr. Princz did not assert a claim arising under federal law, the court did not embark upon an extensive analysis of whether it would have been possible, after the effective date of the FSIA, to secure jurisdiction over a foreign sovereign under 28 U.S.C. § 1331 or whether, in fact, § 1331 implicitly became as ineffective as the explicitly- amended § 1332 in securing jurisdiction over a foreign sovereign once the FSIA was enacted.

But in the case at bar, such an analysis is necessary, for plaintiffs have attempted to invoke the subject matter jurisdiction of this court pursuant to 28 U.S.C. § 1331, as well as the Alien Tort Claims Act. The question then arises: is there a distinction between § 1332, diversity jurisdiction, and § 1331, federal question jurisdiction, when a suit is brought by a plaintiff against a foreign sovereign? Does the fact that § 1332 was actually altered by Congress in 1976 to accommodate the passing of the FSIA somehow distinguish that provision from § 1331 or the Alien Tort Claims Act?

The Supreme Court addressed precisely that question in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 109 S.Ct. 683 (1989), where a Liberian corporation tried to bring claims of international law violations against the Argentine Republic under the Alien Tort Claims Act. The Court wrote:

> We think that the text and structure of the FSIA demonstrate Congress' intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts. Sections 1604 and 1330(a) work in tandem: § 1604 bars federal and state courts from exercising jurisdiction when a foreign state is entitled to immunity, and § 1330(a) confers jurisdiction on district courts to hear suits brought by United States citizens and by aliens when a foreign state is not entitled to immunity. As we said in *Verlinden*, the FSIA "must be applied by the district courts in every action against a foreign sovereign, since subject-matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity."

Id. at 434-35, 109 S. Ct. at 688.

Even more pertinently, the Court specifically suggested that there is no distinction to be made between § 1332, which Congress explicitly amended in light of the passage of the FSIA, and other jurisdictional provisions such as § 1331 and the Alien Tort Claims Act, which Congress did not explicitly amend:

> We think that Congress' failure in the FSIA to enact an express pro tanto repealer of the Alien Tort Statute speaks only faintly, if at all, to the issue involved in this case. In light of the comprehensiveness of the statutory scheme in the FSIA, we doubt that even the most meticulous draftsman would have concluded that Congress also needed to amend pro tanto the Alien Tort Statute and presumably such other grants of subject-matter jurisdiction in Title 28 as § 1331 (federal question), § 1333 (admiralty), § 1335 (interpleader), § 1337 (commerce and antitrust), and § 1338 (patents, copyrights, and trademarks).

> Congress provided in the FSIA that "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States in conformity with the principles set forth in this chapter," and very likely it thought that should be sufficient. § 1602 (emphasis added); *see also* H.R. Rep., at 12; S. Rep., at 11, U.S. Code Cong. & Admin. News 1976, p. 6610 (FSIA "intended to preempt any other State and Federal law (excluding applicable international agreements) for according immunity to foreign sovereigns").

Id. at 437-438, 109 S. Ct. at 690. Thus, the court concluded: "We hold that the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Id.* at 443, 109 S. Ct. at 693.

Plaintiffs attempt to distinguish *Amerada Hess* by arguing that the Court in that case had no occasion to consider the retroactivity of § 1330 or other provisions of the FSIA to events occurring before its effective date, since the claims in *Amerada Hess* concerned events alleged to have occurred in 1982. *See* Pls.' Sur Repl. at 4. But the language of the *Amerada Hess* Court belies plaintiffs' assertion. The Court specifically noted Congress's command that "claims of foreign states to immunity should *henceforth* be decided by courts of the United States in conformity with the principles set forth in this chapter." *Amerada Hess*, 488 U.S. at 437, 109 S. Ct. at 690 (emphasis added). And just as the D.C. Circuit found in *Princz* that "Mr. Princz offers no case law, and we are aware of none, suggesting that a court can revive the pre-FSIA diversity jurisdiction of § 1332 over cases brought by a United States citizen against a foreign state in order to entertain a case arising from pre-FSIA facts," *Princz*, 26 F.3d at 107, this court cannot broaden the scope of § 1331 to reflect its pre-FSIA coverage just because the events alleged to have taken place pre-dated the effective date of the FSIA. "The conclusion is inescapable from the language of the statute that Congress meant § 1330 to be

the exclusive means whereby a plaintiff may sue any foreign state as defined in § 1603(a)." *Ruggiero v. Compania Peruana de Vapores Inca Capac Yupanqui*, 639 F.2d 872, 875 (2d Cir. 1981). "The courts must learn to accept that, in place of the familiar dichotomy of federal question and diversity jurisdiction, the Immunities Act has created a tripartite division [:] federal question cases, diversity cases and actions against foreign states." *Id.* at 876. Congress's language, the D.C. Circuit's holding in *Princz* and especially the Supreme Court's holdings regarding the exclusivity of the FSIA as a means of obtaining jurisdiction over foreign sovereigns in *Amerada Hess* and its more general discussion of the retroactivity of jurisdictional provisions in *Landgraf*, even as clarified by the *qui tam* provision of the False Claims Act discussion in *Hughes*, preclude a return to the jurisdictional regime pre-existing the passage of the FSIA.

This precise question was squarely addressed in a Seventh Circuit case decided in February of this year. In *Sampson v. Fed'l Republic of Germany*, 250 F.3d 1145 (7th Cir. 2001), that Circuit considered a suit by a pro se Holocaust survivor who had sued the government of Germany for his imprisonment in Nazi concentration camps. His claim was dismissed by the district court that heard it, in part based on sovereign immunity. On appeal, the D.C. Circuit appointed Dean Howard Eisenberg and Professor Joseph Kearney of Marquette University Law School as amicus curiae to argue on Sampson's behalf. *See id.* at 1148.

The Seventh Circuit began by starting from the proposition that the FSIA governed the dispute. *See id.* at 1148. "Relevant to this appeal is the FSIA, the federal statute in which Congress defined 'the sole basis for obtaining jurisdiction over a foreign state in our courts.'" *Id.* (citing *Amerada Hess*). Thus, the Seventh Circuit determined that even in a case involving Holocaust-era claims, the FSIA was the sole means of obtaining subject matter jurisdiction. But the Seventh Circuit did not stop

there; it went on to decide, specifically, that the Alien Tort Claims Act, which plaintiffs in the case at bar are trying to use as a basis for jurisdiction, cannot be a basis for jurisdiction in a case against a foreign sovereign:

> It is possible to construe Sampson's brief as arguing that jurisdiction exists under the Alien Tort Claims Act, 28 U.S.C. § 1350. See App. Br. at 9-10 (arguing under international law that there is universal jurisdiction 'when a heinous crime is involved' and that the Alien Tort Claims Act provides a cause of action in this case). Although *Amerada Hess* involved violations of customary international law that were not *jus cogens* violations, the Supreme Court's statement that our jurisdiction is limited to exceptions under the FSIA was absolute, and was based in part on the determination that Congress intended sovereign immunity under the statute to apply even in instances where international law was violated. The Court's holding appears to foreclose Sampson's argument.

Id. at n. 2.[4] *Sampson's* analysis is equally applicable to plaintiffs' attempt to invoke the general federal question

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4. *Sampson* 's claim that the Supreme Court's holding in *Amerada Hess* was based, in part, on the determination that Congress intended sovereign immunity under the statute to apply even in instances where international law was violated does not cite to any specific language in the Supreme Court's opinion, but it is probably a reference to the following passage:

> Congress had violations of international law by foreign state in mind when it enacted the FSIA. For example, the FSIA specifically denies foreign states immunity in suits "in which rights in property taken in violation of international law are in issue." Congress also rested the FSIA in part on its power under Art. I, § 8, cl. 10, of the Constitution "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law

(Cont'd)

jurisdiction of this court. In short, *Sampson* addressed the precise factual situation as the case at bar presents, and the Seventh Circuit found that nothing but the FSIA can be used to secure subject matter jurisdiction over a sovereign state, even if the acts in question pre-date the passage of the FSIA.

In light of the caselaw discussed above, it may be seen that regardless of whether the Second Circuit's decision in *Carl Marks* is still good law, that decision is simply not applicable to the case at bar. With two exceptions that involve distinguishable facts, as detailed below, every single case discussed here or cited by either party, involves a situation where a plaintiff is seeking to *invoke – not avoid –* the coverage of the FSIA.[5] *Carl Marks* was no exception.

(Cont'd)

> of Nations." From Congress' decision to deny immunity to foreign states in the class of cases just mentioned, we draw the plain implication that immunity is granted in those cases involving alleged violations of international law that do not come within one of the FSIA's exceptions.

Amerada Hess, 488 U.S. at 435-36, 109 S. Ct. at 689 (citations omitted).

5. The sole exceptions are Princz, which involved a situation where the court simply analyzed the plaintiff's claim to conclude that the plaintiff could invoke the court's jurisdiction neither under the FSIA nor under pre-existing law, and *Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne de Navigation*, 605 F.2d 648 (2d. Cir. 1979), cited by plaintiffs for the proposition that "retroactive application of FSIA would improperly impair antecedent rights," Pls.' Mem. at 4. *Amoco* is irrelevant to this case, as it involved an attempt by the defendants there to use § 1609 of the FSIA, which had made property of foreign states immune from attachment after the effective date of the FSIA, to attack an attachment that had been made by the plaintiffs before the effective date of the FSIA. *See id.* at 653. Thus, quite naturally, the Second Circuit in *Amoco* held that retroactive application of the FSIA in that case would impair antecedent rights. In fact, in distinguishing *Yessenin-Volpin v. Novosti Press Agency*, 443 F. Supp. 849 (S.D.N.Y.1978), a case there will be occasion to discuss later in the text, the Second Circuit specifically said that "[t]hat case did not involve retroactive application of the Act to quasi in rem attachment proceedings which had already begun," *Amoco*, 605 F.2d at 653-54, thus clearly delineating the very particular circumstances that the *Amoco* court was addressing.

The plaintiff in that case, relying on the fact that the FSIA created new rights to sue by restricting the scope of sovereign immunity, was trying to invoke its coverage and avoid the bar to suit erected by pre-1952 sovereign immunity law. The Second Circuit, fearing that "[s]uch a retroactive application of the FSIA would affect adversely the USSR's settled expectation, rising 'to the level of an antecedent right,' of immunity from suit in American courts," found that the FSIA's sovereign immunity-altering provisions could not be applied retroactively. *Carl Marks*, 841 F.2d at 27. The same situation obtained in *Jackson*. *See supra*. No case that has been unearthed, with the exception of *Yessenin-Volpin*, which will be discussed shortly, has confronted the opposite situation: where a plaintiff actually seeks to avoid application of the sovereign-immunity-restricting FSIA and invoke pre-FSIA sovereign immunity law. This is because no party, at least no party prior to plaintiffs in the case at bar, has argued implicitly, against the grain of Congressional intent and repeated judicial pronouncements, many of which have been noted above, that the FSIA actually *expanded* the coverage of sovereign immunity. Although plaintiffs have stopped short of making that assertion explicitly, this is, in fact, what they would have to be arguing if the FSIA does not allow jurisdiction over their claims, which it does not.[6]

Only one case, *Yessenin-Volpin v. Novosti Press Agency*, 443 F. Supp. 849 (S.D.N.Y. 1978), squarely addressed a claim where a plaintiff, like those here, was actually trying to avoid the sweep of the FSIA. *See id.* at 851, n. 1 ("The plaintiff argues that the Immunities Act which 'became effective only subsequent to the time this action was commenced and long after the accrual of plaintiff's causes of action of claims,' should not be applied to this case.") The district court found

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6. As has been noted above, although plaintiffs did not concede this point, they also did not claim jurisdiction under the FSIA or in any way oppose SNCF's substantive arguments, made both in SNCF's brief in support of the motion and in SNCF's reply, that the FSIA does not permit jurisdiction.

that the FSIA applied retroactively and, moreover, in connection with its retroactivity discussion, made the following observation: "Indeed, insofar as the Immunities Act alters the rights of parties, it does so by *expanding* the ability of plaintiffs to obtain satisfaction of judgments against foreign states." *Id.* at 851, n. 1 (emphasis added).

Plaintiffs here naturally seek to avoid the force of *Yessenin-Volpin:*

> SNCF's reliance on *Yessenin-Volpin* is misplaced. The Second Circuit in *Corporacion Venezolana* [7] merely mentioned without endorsement the court's decision in that case, which was issued a decade before *Carl Marks* and erroneously stated that the substantive provisions of the FSIA could be applied retroactively. Clearly, *Yessenin-Volpin* is no longer good law in light of *Carl Marks.*

Pls.' Sur-Repl. at 3, n. 7 (some citations omitted). But *Yessenin-Volpin* has not been explicitly overruled or even criticized during the twenty-some years of its existence, nor does anything in *Carl Marks* implicitly overrule *Yessenin-Volpin.* The two cases simply address entirely different situations: *Carl Marks,* the situation where a plaintiff seeks to invoke the FSIA for pre-1952 conduct and short-circuit a defendant's well-settled expectations of sovereign immunity for conduct occurring prior to that year, and *Yessenin-Volpin,* the situation where a plaintiff claims, somewhat mysteriously, that the FSIA, intended by Congress to expand a plaintiff's ability to sue foreign sovereigns, actually contracts his ability to do so, and seeks, consequently, to avoid the FSIA and fall back upon pre-existing sovereign immunity law. In the latter situation, which is the case at bar, the *Yessenin-Volpin* court found that there is no danger of a harmful retroactive effect, and so retroactivity of the FSIA is permissible.

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7. The case is *Corporacion Venezolana de Fomento v. Vintero Sales Corp.,* 629 F.2d 786 (2d Cir. 1980).

There is no need to decide, however, whether or not plaintiffs here are prejudiced in an impermissibly retroactive way by the application of the FSIA to this case, since, as we have already seen, even if they were prejudiced and even if the FSIA's sovereign immunity law were, consequently, not applicable here-that is, even if older sovereign immunity law could be applied-there would still be no way to restore the jurisdictional regime of a bygone era and exercise jurisdiction over SNCF under § 1331 or the Alien Tort Claims Act.

Thus, there is no need here to fly in the face of the Second Circuit in *Carl Marks* and claim that it has been overruled by subsequent Supreme Court decisions. It is enough, rather, to make the observation that *Carl Marks* does not address the dispute in this case, viz., whether a pre-FSIA jurisdictional regime might be revived in order to gain jurisdiction over claims which the FSIA's jurisdictional provision does not permit a federal court to hear. And, in fact, the most telling thing about *Carl Marks* may be the fact that after concluding that the FSIA did not apply to the plaintiff's claims, the Second Circuit did not go on to analyze whether those claims might yet be heard under a pre-1952 jurisdictional regime. It did not have to do so because, as the district court in *Carl Marks* found, if the FSIA did not apply to the plaintiff's claims, there simply was no subject matter jurisdiction over those claims. *See Carl Marks & Co., Inc. v. Union of Soviet Socialist Republics*, 665 F. Supp. 323, 336 (S.D.N.Y. 1987) ("The dispositive issue before this Court, therefore, is the same as that in *Slade* and *Jackson:* whether the FSIA applies retroactively so as to confer jurisdiction over a foreign sovereign for its commercial activities engaged in long before the effective date of the FSIA and before the 1952 Tate Letter. If so, this Court had jurisdiction to enter a default judgment, which should now be vacated granting leave to the Soviet Union to answer or move with respect to the Complaint. *If not, the Complaint must be dismissed for want of subject matter jurisdiction.*" (emphasis added)).

Finally, plaintiffs make the following assertion in their sur-reply: "Significantly, in its reply papers, SNCF fails to address the decision by Judge Sterling Johnson, Jr. holding, *inter alia*, that subject matter jurisdiction under 28 U.S.C. §§ 1331, 1350 and 1367 exists as to Holocaust-related claims. *See Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 127-28 (E.D.N.Y. 2000)." Pls.' Sur Repl. at 5. Judge Johnson, however, did not evaluate and had no cause to evaluate a sovereign immunity defense. The defendants in Judge Johnson's case were private banking institutions operating in France during World War II and their predecessors or successors. *See id.* at 121; *see also id.* at 130-131 ("This is a lawsuit between private litigants for specific historical injury."). Consequently, he wrote, in addressing the applicability of the "Acts of State" doctrine: "In this case, it does not appear that this Court is being asked to pass judgment on the acts of a foreign state." *Id.* at 130. Thus, no sovereign immunity defense was possible. The banks simply did not fit into the FSIA's definition of a "foreign state," thereby rendering that statute wholly inapplicable. Accordingly, traditional jurisdictional principles of federal jurisdiction enunciated in §§ 1331, 1350 and 1367 applied to the case. They were not precluded by § 1330 and the FSIA. But this is not the case here. Plaintiffs have been unable to cite any authority where, after the enactment of the FSIA, a court invoked § 1331 or the Alien Tort Claims Act to establish subject matter jurisdiction over a foreign sovereign, as they seek to do here. The cases they cite do not support the proposition plaintiffs seek to establish, involving, as they do, either no foreign sovereign, *see Bodner supra; Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (finding subject matter jurisdiction over plaintiffs' claims of genocide and other acts in violation of international law against suspected Bosnian Serb war criminal Radovan Karadzic under the Alien Tort Claims Act) or conduct occurring before the enactment of the FSIA. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

Thus, whatever the weighty moral issues raised by plaintiffs' claims, this court simply has no jurisdiction over such claims by virtue of SNCF's uncontested and incontestable status as an agency or instrumentality of the nation of France here allegedly involved in actions to which no exception to the FSIA applies. There is, therefore, no need to address plaintiffs' claims that there would have been jurisdiction over SNCF prior to the passage of the FSIA. Implicitly, they are claiming, that the FSIA stripped that jurisdiction, despite Congress's intention to enact the restrictive theory of sovereign immunity and multiple judicial pronouncements confirming Congress's understanding. *See, e.g., Schmidt v. Polish People's Republic*, 742 F.2d 67, 71 (2d Cir. 1984) ("the [FSIA] indisputably enhances a party's capacity to obtain personal jurisdiction over a foreign state").

Nevertheless, it is worth noting that plaintiffs' claims that pre-1952 sovereign immunity law would have worked to permit jurisdiction in this case appears unsupported. Every case cited by plaintiffs for the proposition that pre-FSIA law allowed suits for commercial acts involves a commercial act with some direct commercial connection to the United States, which is precisely the understanding that the commercial activities exception to the FSIA codifies. Plaintiffs have not adduced any case where an American court exercised jurisdiction over a foreign sovereign for commercial acts having no direct commercial effect on the United States, as is the case here. The cases they cite in their brief where jurisdiction was found to exist are all cases where a direct commercial effect on the United States existed. *See* (in reverse chronological order) *Et Ve Balik Kurumu v. B.N.S. Internat'l Sales Corp.*, 25 Misc.2d 299, 204 N.Y.S.2d 971, 974 (Sup. Ct. N.Y. Co. 1960) (contract with American businesses); *In re Investigation of World Arrangements*, 13 F.R.D. 280, 286 (D.D.C. 1952) (purported violations of Sherman Act); *The Uxmal*, 40 F. Supp. 258, 259 (D. Mass. 1941) ("This libel in rem is brought against the Mexican Steamship Uxmal. It is alleged that the libellant, a

stevedore, was injured while discharging a cargo of logs at Baltimore."); *Ulen & Co. v. Bank Gospodarstwa Krajowego (Nat'n Economic Bank)*, 261 A.D. 1, 24 N.Y.S.2d 201 (2d Dep't 1940) (suit on defendant's trust agreement with City of New York with the Chase National Bank as trustee); *United States v. Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199 (S.D.N.Y. 1929) (suit brought by U.S. to enjoin alleged violations of antitrust laws by defendants); *Coale v. Société Co-operative Suisse des Charbons*, 21 F.2d 180 (S.D.N.Y. 1921) (breach of contract with American company); *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 143 (1812) (merchant vessels entering U.S. territory for trade purposes). *Deutsches Kalisyndikat Gesellschaft*, upon which plaintiffs rely heavily, actually makes the requirement that there be a direct commercial effect on the United States quite explicit:

> There has also been submitted a letter from the Secretary of State of the United States to the Attorney General, stating that it has long been the view of the Department of State that agencies of foreign governments engaged in ordinary commercial transactions in the United States enjoy no privileges or immunities not appertaining to other foreign corporations, agencies, or individuals doing business here, and that they should conform to the laws of this country governing such transactions.

Id. at 200.[8]

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8. Plaintiffs adduced two cases in a post-oral argument submission to this court, these being *Wheeler v. Société Nationale Des Chemins De Fer Français*, 108 F.Supp. 652 (S.D.N.Y.1952) and *Shulman v. Compagnie Generale Transatlantique*, 152 F. Supp. 833 (S.D.N.Y.1957), both involving injuries occurring in Europe on SNCF trains. These cases were both premised on conduct that occurred during the era between 1946 and 1987 during which SNCF had a New York office where tickets for SNCF trains could be purchased. *See* Def.'s Letter of Sept. 13, 2001. But even more importantly, the decisions do not reject a sovereign immunity defense for SNCF. SNCF simply did not raise that defense in these cases.

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Plaintiffs also make mention of the "separate entity rule," which, they claim, prior to the enactment of the FSIA, permitted suits against corporate entities that had a distinct existence from the sovereign and were not the sovereign itself. In support of this claim, plaintiffs heavily rely on an article by William C. Hoffman in the Tulane Law Review, *see* William C. Hoffman *The Separate Entity Rule in International Perspective: Should State Ownership of Corporate Shares Confer Sovereign Status for Immunity Purposes?* 65 Tul. L.Rev. 535. According to Hoffman, § 1603(b) of the FSIA, which defined state-majority-owned corporations as "agenc[ies] or instrumentalit[ies]" of a foreign state entitled to sovereign immunity, did indeed broaden sovereign immunity from its pre-1952 coverage. *See id.* at 538-539. Hoffman writes:

> Most significantly, section 1603(b) does not require that an entity seeking the protections of the FSIA show that it is engaged in sovereign activity. Rather, section 1603(b)(2) creates a presumption that any foreign state-owned entity is engaged in sovereign activity. This presumption, which has virtually no support in international or pre-FSIA American law, actually enlarges the availability of the immunity defense. As presently written, section 1603(b) can confer sovereign status on any corporation owned in whole or in part by one or more foreign states, regardless of the nature of its activities.
>
> In the end, sovereign status can have the effect of immunizing entities that, but for

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There are, of course, numerous reasons, legal, practical or strategic, why SNCF may have failed to assert a sovereign immunity defense. Without a court decision on the sovereign immunity issue, it cannot be concluded that plaintiffs' claim that they would have been able to sue SNCF on their current claims prior to the FSIA, which is otherwise belied by the caselaw and the history of the FSIA's enactment, is a valid one.

> state-ownership, are ordinary commercial corporations. . . .
>
> . . . .
>
> Section 1603(b) abolished its predecessor, the "separate entity rule." This rule, which today is the internationally recognized rule, provides that foreign state-owned entities with separate legal personalities generally are not entitled to assert sovereign immunity.

Id. at 539-40. "[C]ommentators criticized the separate entity rule, and Congress, in enacting the FSIA, adopted its opposite presumption in section 1603(b)," Hoffman continues. *Id.* at 540.

Certainly, it would seem that these excerpts from Hoffman's article lend some support to plaintiffs' claims that government entities, as opposed to governments, were entitled to sovereign immunity prior to 1976. However, Hoffman clarifies his broad statements about pre-FSIA international law and the application of the separate entity rule later in his article:

> By the 1920s, the separate entity rule was applied in the foreign sovereign immunity context in state and lower federal courts. Commercial corporations generally, whether wholly or partly owned or controlled by a foreign state, were presumptively not immune. But "if a corporation functioned as a public agency or instrumentality or where evidence of corporate separateness from the government was not strong," the court could disregard the corporate form and grant immunity. Banking, shipping and railroad companies, as well as agricultural, mining, and other commercial corporations, were often granted or denied immunity solely on that basis.

Id. at 545-548. Specifically with respect to railroad corporations, Hoffman added the following footnote:

> Railway corporations were almost uniformly held immune, although for various reasons. *Compare Oliver Am. Trading Co. v. Mexico*, 5 F.2d 659, 661, 665 (2d Cir. 1924) (Mexican National Railroad possessed, controlled and operated by state for "national purposes") with *Bradford v. Director Gen. of R.R. of Mex.*, 278 S.W. 251, 252 (Tex. Civ. App. 1925) (Mexican National Railroad held an "agent" of the state) and *Mason v. Intercolonial Ry. of Canada*, 83 N.E. 876 (1908) (Canadian railway not a corporation and operated by sovereign in a governmental function). *But see Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter, Inc.*, 300 F. 891, 892 (Swedish railway corporation held [by Judge Learned Hand to be] entity separate from state).

Id. at 546, n. 62.

Plaintiffs attempt to cast doubt upon the applicability of this portion of Hoffman's article:

> [T]he single sentence SNCF relies on from the Hoffman article is merely a footnote in a paragraph on the separate entity rule, which generally held that a separate corporation, whether wholly owned by a sovereign or not, was presumptively not immune. That footnote cites several inapposite cases relied upon by SNCF. In each of these cases, however, the railroad was found by the court either not to be a separate corporation, or was not operated as a separate entity.

Pl.'s Repl. at 7. However, plaintiffs' argument fails for several reasons. The paragraph from the Hoffman article to

which plaintiffs point, in addition to saying that corporations, whether wholly owned by the government or not, were generally not immune, also specifically said, as quoted above, that " 'if a corporation functioned as a public agency or instrumentality or where evidence of corporate separateness from the government was not strong,' the court could disregard the corporate form and grant immunity."

SNCF, it must be remembered, is no regular corporation. It is, in fact, not a corporation at all, but, as noted in the "Background" section above, an "établissement public industriel et commercial," an instrumentality of the state charged with performing a public service, namely, operating a monopoly railroad in France. Haimo Decl. ¶¶ 2-3. It has no shares or shareholders. *See id.* ¶ 3. Its President and governing board are appointed by the French government. *See id.* SNCF's employees are, in large majority, governed by a special statute which grants them rights reserved generally to public servants under French Law. *See id.* It can exercise police powers and powers of eminent domain normally reserved to the state.[9] *See id.*

The cases cited in the Hoffman article may involve fact patterns where an even higher degree of government control was present, yet the holdings of these cases did not seem to turn on this fact. In *Oliver*, for example, the Second Circuit, in holding that the National Railways of Mexico were entitled to sovereign immunity in the United States, noted:

> It is said that the Mexican government, in operating the National Railways of Mexico, is engaged in trade and in a nongovernmental enterprise. This view of the matter we do not

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9. It is true that this description reflects SNCF as it is currently organized, and its organization may have been slightly different during the era at issue in this case. However, it was fundamentally the same entity serving the same function and wholly owned by the government of France. Plaintiffs have conceded as much.

> accept. It is a fact, of which we take judicial notice, that in the leading countries of Europe, as well as in Canada, it is the practice of governments to own and operate the railways. This is not regarded by them as engaging in trade, but as the performance of a fundamental governmental function. It evidently is so regarded in Mexico, and while in the United States the railways are not owned and operated by either the state or federal governments, we are not justified, on that account, in holding that the Mexican government is engaged in trade, and not performing a governmental function, in operating the National Railways of Mexico.

Oliver, 5 F.2d at 665. This understanding was echoed six years later by the Second Circuit in *Dexter & Carpenter v. Kungligjarnvagsstyrelsen, Inc.*, 43 F.2d 705 (2d Cir. 1930), where the court, in holding that sovereign immunity extends to the rail system of Sweden, noted that "[t]he railroads are a part of the public property, and their operation is a governmental enterprise." *Id.* at 510. These are Second Circuit cases from the relevant period with language that seems to be directly on point. The factual distinction that plaintiffs seek to make between the railroads in those cases and the present one does not appear to be a meaningful one, given both this language and SNCF's indisputable status as a public entity with a form and function very different from a regular corporation engaged in for-profit business dealings.

At most, even if it is said, against the weight of the law cited above, that plaintiffs have succeeded in creating an ambiguity about pre-FSIA law (but then, the FSIA was enacted, in part, specifically because pre-FSIA law was unpredictable), an ambiguity does not give rise to solid expectations of legal consequences that could be unfairly and retroactively undermined by a subsequent clarification

in the law.[10] In any case, even if any such ambiguity existed in pre-FSIA law, this court would have no subject matter jurisdiction over plaintiffs' claims.

Conclusion

Because plaintiffs have failed to show a basis for subject matter jurisdiction under the FSIA over their claims against SNCF, and no other basis for subject matter jurisdiction over these claims exists, SNCF's motion to dismiss is granted.[11]

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10. Moreover, if plaintiffs' argument is, following Hoffman, that the FSIA, in enacting § 1603(b)(2) in 1976, overturned the "separate entity rule" in existence until then, their attempt to use the Second Circuit's decision in *Carl Marks* to argue that the FSIA has been held not retroactive prior to 1952 is significantly weakened. This is because while the FSIA may have codified the restrictive theory of sovereign immunity in existence since at least 1952, thereby making it fair to hold the statute retroactive to that year, the FSIA, adopting plaintiffs' position, abolished the separate entity rule in existence up until *1976*. Thus, it would not have been fair to litigants to hold the statute retroactive even to 1952 for these purposes. The entire rationale behind the 1952 date established by *Carl Marks* would fall apart, at least for the purposes of the case at bar. Plaintiffs, instead of relying on *Carl Marks* would have to try, then, to distinguish *Carl Marks* and argue, without any caselaw to help them, that while most of the FSIA has been held retroactive to 1952, § 1603(b), insofar as it conflicts with the separate entity rule, should not be applied retroactively at all. While that position may have some appeal, unfortunately for plaintiffs, there is no authority for the proposition.

11. Plaintiffs' cross-motion for further discovery relevant to the sovereign immunity issues is denied, since plaintiffs have not adduced any factual issues the resolution of which could possibly change the outcome of the sovereign immunity inquiry. Plaintiffs' motion for discovery specifies two possible factual areas worthy of exploration:

> First, Plaintiffs are entitled to discover relevant information concerning the structure, operations, finances, property, assets, investments, and management of SNCF (and related entities) during the relevant time period, among other potential areas of inquiry. The Terrier declaration submitted by SNCF does not address these questions in any genuinely useful form. Secondly, there may be more lawsuits, of which Plaintiffs are currently unaware, in which SNCF did not

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Appendix B

Dated: Brooklyn, New York
November 5, 2001

SO ORDERED.
s/ David G. Trager
David G. Trager
United States District Judge

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raise sovereign immunity as a defense, or took other actions which should be construed as an estoppel or waiver.

Pls.' Mem. at 32. However, plaintiffs have conceded that the SNCF is an entity wholly owned by the French government, *see* Pls.' Compl. ¶ 17. There is, therefore, no genuine dispute about whether or not SNCF falls into the definition of a "foreign state" for the purposes of the FSIA. As far as other lawsuits in which SNCF may have failed to raise a sovereign immunity defense, failing to raise a sovereign immunity defense in another case does not constitute a waiver of sovereign immunity in this case. *See* discussion of three possible bases for finding a waiver of the sovereign immunity defense *supra*. Plaintiffs have, consequently, not alleged any facts that, if true, would change the outcome of the subject matter jurisdiction determination.

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

00-CV-5326 (DGT)

RAYMONDE ABRAMS, et al.,

Plaintiffs,

-against-

SOCIETE NATIOALE DES CHEMINS DE FER FRANCAIS,

Defendant.

JUDGMENT

A Memorandum and Order of Honorable David G. Trager, United States District Judge, having been filed on November 7, granting Societe Nationale Des Chemins De Fer Francais's motion to dismiss the case, due to plaintiffs' failure to show a basis for subject matter jurisdiction under the Foreign Sovereign Immunities Act; it is

ORDERED and ADJUDGED that plaintiffs take nothing of the defendant; that the Societe Nationale Des Chemins De Fer Francais's motion to dismiss the case for failure to show subject matter jurisdiction is granted.

Dated: Brooklyn, New York
November 13, 2001

s/ Robert C. Heinemann
ROBERT C. HEINEMANN
Clerk of Court

APPENDIX C – U.S. FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976

28 U.S.C. § 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

28 U.S.C. § 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000 exclusive of interest and costs, and is between–

* * *

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or

of different States. For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

* * * *

28 U.S.C. § 1441. Actions removable generally

* * *

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

* * * *

28 U.S.C. § 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the c aims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them

in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

28 U.S.C. § 1603. Definitions

For purposes of this chapter–

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity–

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a

particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

28 U.S.C. § 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in

connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to–

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function

regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights;

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable; or

(7) not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section

2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph—

(A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act or the act is related to Case Number 1:00CV03110(EGS) in the United States District Court for the District of Columbia; and

(B) even if the foreign state is or was so designated, if—

(i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or

(ii) neither the claimant nor the victim was a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act) when the act upon which the claim is based occurred.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: Provided, That—

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard

and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in the Ship Mortgage Act, 1920 (46 U.S.C. 911 and following). Such action shall be brought, heard, and determined in accordance with the provisions of that Act and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

(e) For purposes of paragraph (7) of subsection (a)–

(1) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages; and

(3) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.

(f) No action shall be maintained under subsection (a)(7) unless the action is commenced not later than 10 years after the date on which the cause of action arose. All principles of equitable tolling, including the period during which the foreign state was immune from suit, shall apply in calculating this limitation period.

(g) Limitation on discovery.–

(1) In general.–

(A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for subsection (a)(7), the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would

significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) Sunset.—

(A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would—

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) Evaluation of evidence.—The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) Bar on motions to dismiss.—A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) Construction.—Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

Appendix C

28 U.S.C. § 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

28 U.S.C. § 1607. Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim—

(a) for which a foreign state would not be entitled to immunity under section 1605 of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

Appendix C

28 U.S.C. § 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular

Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted. As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made—

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or

an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section

28 U.S.C. § 1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

28 U.S.C. § 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

Appendix C

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property—

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: Provided, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605(a)(7), regardless of whether the property is or was involved with the act upon which the claim is based.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if –

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a) (2), (3), (5), or (7), or 1605(b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry

of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if –

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

(f)(1)(A) Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22 U.S.C. 4308(f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701-1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim

for which a foreign state (including any agency or instrumentality or such state) claiming such property is not immune under section 1605(a)(7).

(B) Subparagraph (A) shall not apply if, at the time the property is expropriated or seized by the foreign state, the property has been held in title by a natural person or, if held in trust, has been held for the benefit of a natural person or persons.

(2)(A) At the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign state is not immune under section 1605(a)(7), the Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

(B) In providing such assistance, the Secretaries—

(i) may provide such information to the court under seal; and

(ii) should make every effort to provide the information in a manner sufficient to allow the court to direct the United States Marshall's office to promptly and effectively execute against that property.

(3) Waiver.—The President may waive any provision of paragraph (1) in the interest of national security.

28 U.S.C. § 1611. Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if—

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

(c) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution in an action brought under section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes.

APPENDIX D – ALIEN TORT STATUTE

28 U.S.C. § 1350. Alien's action for tort

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

APPENDIX E – SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT IN *GARB v. REPUBLIC OF POLAND, WHITEMAN v. REPUBLIC OF AUSTRIA* DATED AND FILED AUGUST 6, 2003

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 6th day of August, two thousand and three.

PRESENT:

AMALYA L. KEARSE,
JOSÉ A. CABRANES,
CHESTER J. STRAUB,
Circuit Judges.

No. 02-7844

THEO GARB, BELLA JUNGEWIRTH, SAM LEFKOWITZ, PETER KOPPENHEIM, JUDAH WELLER, CHANA LEWKOWICZ, SAMUEL GOLDIN, KARL DIAMOND, HALA SOBOL, SAUL KLAUSNER and GOLDIE KNOBEL, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

Appendix E

REPUBLIC OF POLAND, MINISTRY OF THE TREASURY OF POLAND (MINISTERSTWO SKARBU PANSTWA), JOHN DOES #1-100 and MINISTRY OF THE TREASURY OF POLAND (MINISTERSTWO SKARBU PANSTWA),

Defendants-Appellees.

No. 02-9361

DORIT WHITEMAN, ALFONS SPERBER, HERTHA FIELD, ALICE JAY SUSSMAN, ANITTA LEA, ROBERT WEINBERGER, RUDOLF AUSPITZ, MAX URI, FRITZ URI, LEO GRANIERER, SOPHIE HABER, GERTRUDE FIALA, HARRIET MEHL-ROTTENBERG, GERDA FELDSBERG, ALEXANDER-SANDOR FÜRST, ERNST B. RIVIN-RIESENFELD, LIZZY RAPP-BAUER, RUTH DAVIDOVITS, DOROTHEA WINKLER, ERICH RICHARD FINSCHES, MICHAEL SCHWARZ, HEINZ BISCHITZ, LOTTIE MECZES-SCHWENK, LUGE SVOBODA, FRIEDERIKE HERZL, and ROBERT KLEIN,

Plaintiffs-Appellees,

v.

REPUBLIC OF AUSTRIA, DOROTHEUM GMBH, a/k/a DOROTHEUM AUKTIONS-, VERSATZ-, UND BANKGESELLSCHAFT MBH, ÖSTERREICHISCHE INDUSTRIEHOLDING AG,

Defendants-Appellants,

VOEST-ALPINE STAHL AG, VA TECHNOLOGIE AG, BÖHLER UDDEHOLM AG, ÖMV AG, RAIFFEISEN ZENTRAL ÖSTERREICHISCHE BANK A.G., STEYR-DAIMLER-PUCH AG, a/k/a STEYR DAIMLER-PUCH SPEZIALFAHRZEUG AG, a/k/a STEYR DAIMLER PUCH FAHRZEUG TECHNIK AG, UNIQA VERSICHERUNGEN AG, AUSTRIAN DOE CORPORATIONS 1 to 100, ERSTE BANK DER OESTERREICHISCHEN SPARKASSEN AG,

Defendants.

Appendix E

No. 02-3087

In re REPUBLIC OF AUSTRIA, DOROTHEUM GMBH & CO KG, and ÖSTERREICHISCHE INDUSTRIEHOLDING AG,

Petitioners.

DORIT WHITEMAN, ALFONS SPERBER, HERTHA FIELD, ALICE JAY SUSSMAN, ANITTA LEA, ROBERT WEINBERGER, RUDOLF AUSPITZ, MAX URI, FRITZ URI, LEO GRANIERER, SOPHIE HABER, GERTRUDE FIALA, HARRIET MEHL-ROTTENBERG, GERDA FELDSBERG, ALEXANDER-SANDOR FÜRST, ERNST B. RIVIN-RIESENFELD, LIZZY RAPP-BAUER, RUTH DAVIDOVITS, DOROTHEA WINKLER, ERICH RICHARD FINSCHES, MICHAEL SCHWARZ, HEINZ BISCHITZ, LOTTIE MECZES-SCHWENK, LUGE SVOBODA, FRIEDERIKE HERZL, and ROBERT KLEIN,

Plaintiffs-Respondents,

v.

REPUBLIC OF AUSTRIA, DOROTHEUM GMBH, a/k/a DOROTHEUM AUKTIONS-, VERSATZ-, UND BANKGESELLSCHAFT MBH, ÖSTERREICHISCHE INDUSTRIEHOLDING AG,

Defendants-Petitioners,

VOEST-ALPINE STAHL AG, VA TECHNOLOGIE AG, BÖHLER UDDEHOLM AG, ÖMV AG, RAIFFEISEN ZENTRAL ÖSTERREICHISCHE BANK A.G., STEYR-DAIMLER-PUCH AG, a/k/a STEYR DAIMLER-PUCH SPEZIALFAHRZEUG AG, a/k/a STEYR DAIMLER PUCH FAHRZEUG TECHNIK AG, UNIQA VERSICHERUNGEN AG, AUSTRIAN DOE CORPORATIONS 1 TO 100, ERSTE BANK DER OESTERREICHISCHEN SPARKASSEN AG,

Defendants.

Appendix E

Consolidation of (1) appeal in *Garb v. Poland*, No. 02-7844, from June 26, 2002 judgment entered by the United States District Court for the Eastern District of New York (Edward R. Korman, *Chief Judge) dismissing* plaintiffs' claims; (2) appeal in *Whiteman v. Austria*, No. 02-9361, from a discovery order of the United States District Court for the Southern District of New York (Shirley Wohl Kram, *Judge)*; and (3) No. 02-3087, a petition for writ of mandamus filed by several defendants in *Whiteman v. Austria* to compel the United States District Court for the Southern District of New York (Shirley Wohl Kram, *Judge)* to decide a motion to dismiss. The consolidated appeals present the questions, *inter alia*, whether and on what terms the federal courts have jurisdiction under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-1611, to adjudicate the liability of foreign governments for actions preceding the FSIA's enactment.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment and order of the District Courts be and hereby are VACATED AND REMANDED, and the petition for writ of mandamus be and hereby is DENIED.

Plaintiffs in these consolidated matters are Jews (and their heirs and successors) who seek relief from abuses and deprivations allegedly effected by defendant states and their instrumentalities during and subsequent to World War II.

Plaintiffs in *Garb v. Poland*, No. 02-7844, are Jewish former citizens of Poland who claim that the Polish government wrongfully confiscated their land following World War II pursuant to an official post-war policy encouraging the migration of surviving Jews through the dispossession of Jewish property. Plaintiffs argue that their claims are authorized by two exceptions to sovereign immunity under the FSIA: the "commercial activity" exception, 28 U.S.C. § 1605(a)(2), and the "takings" exception, 28 U.S.C. § 1605(a)(3). The District Court granted

defendants' motion to dismiss with respect to both claimed exceptions. *See Garb v. Poland*, 207 F. Supp. 2d 16, 33 (E.D.N.Y. 2002). Plaintiffs appeal the judgment of the District Court.

In *Whiteman v. Austria*, Nos. 02-9361 and 02-3087, plaintiffs are present and former Jewish citizens and residents of Austria who lost property under the Nazi regime in Austria from 1938 until 1945. They allege the extensive involvement of defendants-appellants in the confiscation and continued ownership of specific property, including works of art recently offered for auction in the United States. Plaintiffs argue that their claims are authorized under exceptions to the FSIA for "commercial activity," 28 U.S.C. § 1605(a)(2), "takings," 28 U.S.C. § 1605(a)(3), and waiver, 28 U.S.C. § 1605(a)(1). The District Court ordered the parties to engage in limited discovery on the threshold question of jurisdiction. *Whiteman v. Austria*, 00 Civ. 8006, slip op. at 5 (S.D.N.Y. June 10, 2002). The District Court entered a further order denying defendants' application that the Court decide a motion to dismiss prior to requiring them to undergo jurisdictional discovery. *Whiteman v. Austria*, No. 00 Civ. 8006, 2002 WL 31368236, at *8 (S.D.N.Y. Oct. 21, 2002). Defendants appealed the discovery order, No. 02-9361, then filed a petition for writ of mandamus to compel the District Court to decide their motion to dismiss, No. 02-3087.

Each of the instant cases raises the threshold questions whether and on what terms the federal courts have jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602-1611, to adjudicate the liability of sovereign states for conduct occurring prior to the statute's enactment.

Another panel of this Court recently held in *Abrams v. Société Nationale Des Chemins De Fer Francais*, 332 F.3d 173 (2d Cir. 2003), that whether the FSIA applies retroactively in a particular case depends on whether such application

would have an impermissible "retroactive effect"—that is, whether applying the FSIA would "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at 180-81 (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994) (internal quotation marks omitted)). This determination requires "a common-sense, functional judgment about whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* at 185 (quoting *INS v. St. Cyr*, 533 U.S. 289, 321 (2001) (internal quotation marks omitted)). The *Abrams* Court therefore concluded that whether or not the FSIA applied retroactively to alleged offenses that occurred prior to the statute's enactment depended on whether the plaintiffs in a particular case "could have legitimately expected to have their claims adjudicated in the United States prior to the FSIA's enactment." *Id.* at 186. Such a determination requires the District Court to conduct a factual inquiry into the sovereign immunity enjoyed by the particular state—in *Abrams*, France; in the instant cases, Poland and Austria—prior to the enactment of the FSIA. *See id.* at 186-87.

As our Court recognized in *Abrams*, the general history of United States policy on sovereign immunity is well established. *See id.* at 176-78. Judicial determinations of jurisdiction over sovereign states prior to the FSIA "usually deferred to the decision of the executive" regarding sovereign immunity, which was often expressed in the form of a "suggestion of immunity" filed by the Department of Justice at the request of the Department of State. *Id.* at 176-77. In this manner, "the executive branch played a prominent role in deciding whether a foreign sovereign was immune from suit in American courts." *Id.* at 176. "Prior to 1952, the United States adhered to the absolute theory of foreign sovereign immunity," but that year the Department of State "announced [a] formal change of policy" to the "restrictive theory of sovereign immunity." *Id.* at 177. Under the new theory, sovereign states retained immunity from claims

challenging their "governmental activities," but they no longer enjoyed immunity in United States courts from "claims arising out of [their] commercial activities." *Id.*

In *Abrams* the Court found that this general history of sovereign immunity was insufficient to support a factual determination of the legitimate expectations of a corporation wholly owned by the French government with respect to sovereign immunity, given the "prominent role" of case-by-case recommendations from the Department of State in sovereign immunity determinations prior to the passage of the FSIA. *See id.* at 176, 186-88. Accordingly, the Court remanded to allow the District Court to undertake a factual inquiry into the Department of State's position prior to the FSIA on sovereign immunity for such an entity. *See id.* at 188.

Faced with this development in the law of the Circuit since we heard oral argument in these matters, we remand for determinations of the Department of State's policy prior to FSIA with respect to sovereign immunity for Poland and Austria in the circumstances presented in each of the instant cases. We note that on remand there exists the possibility that specific evidence of the Department of State's position with respect to a particular country during a given period of time and in the circumstances presented may not exist, and thus that we may generally be forced to rely for such factual determinations on the overarching policies of the Department of State prior to the FSIA, which we acknowledged in *Abrams*. *See id.* at 177 (outlining Department of State policy prior to the FSIA, particularly the Department's "formal change of policy" in 1952 from the "absolute theory" of sovereign immunity to the "restrictive theory" of sovereign immunity). Before so relying, however, we remand to give the parties the opportunity to present particular evidence relevant to the Department of State's position on the sovereign immunity of the nation whose conduct is in question in their particular cases. We direct the District Courts to invite the

participation of the Department of State in developing a record to support their determinations.[1]

Finally, although we remand these cases to two different District Courts, we direct those Courts to coordinate their proceedings as much as possible, insofar as such coordination may avoid duplication of judicial proceedings, hearings, and other efforts by counsel, and otherwise preserve scarce judicial and other resources. We also direct the District Courts to coordinate their proceedings temporally to the extent possible, in order to allow for the continued consolidation of these cases on any future appeals.

For the foregoing reasons, (i) the June 26, 2002 judgment in *Garb v. Poland* entered by the United States District Court for the Eastern District of New York is **VACATED**; the discovery order in *Whiteman v. Austria* of the United States District Court for the Southern District of New York is **VACATED**; the petition by defendants-appellants in *Whiteman v. Austria* for writ of mandamus, No. 02-3087, is **DENIED**; and the causes are **REMANDED** for further proceedings consistent with this order.

For the Court,
Roseann B. MacKechnie, Clerk

by s/ Lucille Carr

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1. We caution the District Courts that the necessary factual inquiry should be conducted with appropriate attention to separation-of-powers concerns, inasmuch as the conduct of foreign relations is delegated to the political branches, *see generally Am. Ins. Ass'n v. Garamendi*, 123 S.Ct. 2374, 2386 (2003), and the adjudication of claims that risk significant interference with foreign relations policy may raise justiciability concerns, *see Kadic v. Karadzic*, 70 F.3d 232, 248-49 (2d Cir. 1995).